Supreme Court, U. S.
FILED
OCT 1 1980
MICHAEL RODAK, JR., CLERK

No. 80-521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LOUDOUN TIMES-MIRROR, *et al.*,

Petitioners,

v.

ARCTIC COMPANY, LTD., t/a
IROQUOIS RESEARCH INSTITUTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is a consultant, hired by a governmental agency to meet the requirements of the National Environmental Policy Act and the National Historic Preservation Act, a "public official" or "public figure" within the meaning of *The New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, when its public policy analysis and conclusions are integral parts of the governmental decision-making process?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Arctic Company, Ltd., T/A Iroquois Research Institute, *Appellant*

Loudoun Times-Mirror, *Appellee*

Kyle Parks, *Appellee*

R. E. McDaniel, *Appellee*

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on July 3, 1980.

OPINION BELOW

The opinion of the Court of Appeals has not yet been officially reported, but is set out in full in Appendix A. It will be referred to throughout this Petition as ___ F.2d ___ (1980). The Court of Appeals decision was unofficially reported in 6 *Media L. Rep.* 1433 (1980).

The opinion of the District Court has not been officially reported, but is set out in full in Appendix B. It will be referred to in this Petition by citation to Appendix B. The District Court decision was unofficially reported in 4 *Media L. Rep.* 1947 (1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 3, 1980. This Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the National Environmental Policy Act of 1969 and the National Historic Preservation Act of 1966, and their respective associated regulations, are lengthy and are accordingly set out in Appendix C.

Pertinent provisions of the following materials are set forth in the Appendix:

National Historic Preservation Act of 1966, 16 U.S.C, §§470, 470a, 470d, 470f, 470i, 470j

Executive Order 11593, of May 13, 1971, 36 Fed. Reg. 8921

National Environmental Policy Act of 1969, 42 U.S.C. §§4321, 4331, 4332, 4337

Advisory Council on Historic Preservation, Final Regulations on Protection of Historic and Cultural Properties, 36 C.F.R. Part 800

STATEMENT OF THE CASE

A. *Nature of the Case.* This case involves three defamation actions, consolidated for trial and appeal, brought by Arctic Company, Ltd., t/a Iroquois Research Institute ("Iroquois"), a private archaeological contracting firm. The actions, respectively, are against the *Loudoun Times-Mirror,* a newspaper published in Loudoun County, Virginia ("The Loudoun Times"); Kyle Parks, one of the Loudoun Times' reporters ("Parks"); and R.E. McDaniel, an archaeologist ("McDaniel"). The case against the Loudoun Times and Parks sounds in common law libel and results from publication by the Loudoun Times on September 14, 1978, of an article written by Parks as part of the newspaper's story on "Lowes Island", more fully discussed in the Statement of Facts. The action against McDaniel stems both from publication of that article and from statements made by McDaniel to Parks during an interview at Lowes Island which occurred on September 9, 1978, upon which Parks partially based his story.

B. *Course of Proceedings and Disposition Below.* Iroquois originally filed these actions in Virginia courts of record. It filed Motions for Judgment against the Loudoun Times and Parks in the Circuit Court of Loudoun County, and against McDaniel in the Circuit Court of Fairfax County. The cases were duly removed to the United States District Court for the Eastern District of Virginia.

Plaintiff neither resisted nor questioned removal, and the District Court found that it had diversity jurisdiction based on 28 U.S.C. §1332 (1970) based upon plaintiff's Alaskan citizenship and the Virginia citizenship of the Loudoun Times and Parks. Diversity also existed between Iroquois and McDaniel because McDaniel is a citizen of Maryland.

Subsequent to removal, the Loudoun Times, Parks and McDaniel all filed answers and followed these with Motions for Summary Judgment, supported by affidavits and memoranda of points and authorities. Although Iroquois filed a Motion in Opposition to the Motions for Summary Judgment, the sole affidavit accompanying Iroquois' Motion in Opposition contained no reference to specific facts which would constitute "malice" in its constitutional sense. After a hearing on the Motions for Summary Judgment on December 15, 1978, the District Court (Albert V. Bryan, Jr., J.) entered an Order on December 18, 1978, awarding Summary Judgment to the Defendants and dismissing the actions. The District Court also filed a Memorandum Opinion set forth in Appendix B, page 9a. Iroquois made a timely appeal to the United States Court of Appeals for the Fourth Circuit.

On July 3, 1980, the Court of Appeals reversed the judgment of the district court and remanded the case. The Fourth Circuit panel consisted of Senior Circuit Judge Field, Judge Russell and Judge Sprouse, who wrote the court's opinion, which is set forth in Appendix A.

C. *Statement of Facts.* The genesis of this case traces back to a stretch of land which juts into the Potomac River and lies at the northeastern tip of Loudoun County, Virginia, called "Lowes Island." Beneath its surface are Indian relics which may date back as far as 12,000 B.C. (Rec., p. 045)* The land also lies directly in the path of urban sprawl from Washington, D.C., giving rise to intense development pressure, including an effort by a large Washington real estate concern to rezone part of the land for commercial development, and the acquisition of a substantial part of the property by a private developer. Finally, and of most immediate concern to this case, the Fairfax County Water Authority ("FCWA"), an

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*The Joint Appendix filed by all parties in the Fourth Circuit constitutes part of the Record of this case. It will be referred to in this Petition as "Rec., p. ___"

agency of the County of Fairfax (Rec., p. 065), selected Lowes Island as the site of a water intake facility for rapidly-growing Fairfax County, not far from the island. (Rec., p 015)

Selection of Lowes Island as the site of FCWA's intake facility aroused public opposition and concern because it endangered the archaeological treasures located there. (Mem. Op., App. B, p. 11a; Rec., pp. 015-018) Various local elected public officials, the Virginia Historic Landmarks Commission, the American Association of University Women, Loudoun County Chapter, and Loudoun County's representative to the Virginia Landmarks Commission became involved in the controversy. (Mem. Op., App. B, p. 11a; Rec. p. 015-018) These groups shared a common goal: to stop construction of the project until FCWA took meaningful steps to protect Lowes Island's archaeological relics. (Mem. Op., App. B, p. 11a; Rec. pp. 014-018) This public pressure and federal law prompted FCWA to retain Iroquois. (Mem. Op., App. B, p. 11a; Rec., p. p. 015) Federal law required that FCWA obtain a permit from the United States Army Corps of Engineers, Baltimore District ("the Corps"), before it could build the facility.* (App. F, p. 52a-53a). Moreover, both the Corps and the FCWA were required to comply with two significant statutes, the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 ("NEPA"), and the National Historic Preservation Act of 1966, 16 U.S.C. §§470-470t, ("NHPA"). Although other legislative and administrative criteria applied, Iroquois was retained to help implement these two Congressional enactments. Iroquois' involvement in the permit process and the public controversy which surrounded it prompted the newspaper story and gave rise to the subsequent libel action. (Rec., pp. 015, 027)

Iroquois, an Alaska corporation, regularly contracted with government agencies to perform archaeological consulting services. (Rec. p. 061) Because its skills and expertise were not

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*Federal law applied because FCWA's contemplated project would draw water from the Potomac River, an interstate navigable waterway.

normally available in governmental agencies such as the Corps or the FCWA, these agencies typically contracted with firms like Iroquois to render consulting services when needed.

In the instant case, FCWA contracted with Iroquois to survey, describe and assess the archaeological, architectural and historic resources at Lowes Island. (Rec., p. 060) The proposal submitted to FCWA by Iroquois on January 5, 1978, specifically recommended an effort "of sufficient scope to appraise potential project impacts on historical and archaeological resources" as required by NEPA, NHPA, Executive Order 11593 ("Protection and Enhancement of the Cultural Environment"), the Advisory Council's Procedures for the Protection of Historic and Cultural Properties (36 C.F.R. 800), and the Office of the Virginia State Historic Preservation Officer. (App. E, p. 00a) A comprehensive report, purporting to meet these criteria, was submitted to FCWA by Iroquois on May 31, 1978. (App. E, p. 47a).

Judge Bryan, in his memorandum opinion, described Iroquois' pervasive role in this governmental process:

> During 1978, the Fairfax County [Water authority] engaged the plaintiff on two occasions:
>
> (a) From early January to late May to prepare an inventory and evaluation of all known archaeological, historical and architectural resources at their project area at Lowes Island; to publish the results; and to develop a mitigation plan which would comply with federal regulations and assist the Water Authority by developing a management plan to preserve these resources in order to acquire a permit for construction from the Corps of Engineers. This was successfully completed. The permit was granted.
>
> (b) From mid-July to mid-August to prepare bidding specifications to enable the Water Authority to put into effect the management plan accepted by the

> United States government and for [sic] which the Commonwealth of Virginia agreed. This was successfully completed. (Aff. Poirier, ¶ 3)

The report, entitled "The Cultural Resources of Lowes Island, Virginia," contained the findings, recommendations and conclusions which resulted from Iroquois' study. Iroquois found that the archaeological resources endangered by the intake facility deserved and required protection from the impending project. It concluded:

> A carefully detailed management plan for adequate mitigation of adverse effects would comply with the National Historic Preservation Act, *et al.* If an adequate management plan is adopted which allows the interference-free mitigation prior to construction, there would be no grounds for denial of the permit.

Iroquois claimed that it had evaluated other sites under consideration as alternative locations for the intake facility, as required by the statutory schemes and implementing regulations. (App. E. p. 46a). It concluded that the site favored by FCWA (denominated as Alternative "D" in the Final Environmental Impact Statement) would no more adversely affect the archaeological treasures on Lowes Island than the alternative locations. (App. E., p. 47a). It recommended, therefore, that the Corps issue the permit to FCWA for site "D" rather than another site. (App. E., p. 47a). It proposed salvaging the archaeological relics rather than preserving them in their natural state by requiring another site for the intake facility. (App. E., p. 47a). It recommended a mitigation plan delineating specific steps for the salvaging of the endangered archaeological resources. (App. E., p. 46a).

Despite the short period of time within which it had to complete its study, and the frozen ground and deep snow which hampered its work, Iroquois recommended no further study to assure that it had located and identified all of the endangered archaeological resources that both deserved and required protection. It did not suggest a more detailed survey of the alternative

project sites to determine whether one of these locations would pose less danger to the archaeological treasures than the site preferred by FCWA. (Rec., pp. 051-055)

These omissions instigated a public outcry from those who believed the issue deserved closer and longer study under more suitable conditions as well as from those who favored preservation of the relics in their natural location.

In a letter of June 28, 1978, from Mr. William F. Kelso, Commissioner of the Virginia Resource Center for Archaeology, to James J. Corbalis, Jr., a senior official at FCWA, Mr. Kelso expressed his disappointment that Iroquois' report was inadequate to help evaluate the various alternative locations and configurations proposed for the water intake project. He also noted the redundancy of Iroquois' work in duplicating results already achieved by Defendant McDaniel. (Rec., p. 020)

Similar disappointment was expressed by John G. Lewis, Loudoun County's representative to the Virginia Historic Landmarks Commission, in a letter of June 27, 1978, to Col. G.K. Withers, the District Engineer for the Corps responsible for issuing the permit to FCWA. Mr. Lewis was particularly disturbed by Iroquois' methodology, which involved excavation of sensitive archaeological sites by means of pneumatic jack hammers. (Rec., p. 023)

In response to the controversy over the Report and the future of Lowes Island, the Loudoun Times concluded that the matter was an important community issue which it should bring to the attention of its readers. The paper assigned Kyle Parks, one of its staff reporters, to write an article. (Rec., p. 027) As part of his coverage of the story, Parks reviewed the correspondence about the Report (which a news source had provided him) and made a trip to Lowes Island on Saturday, September 9, 1978, to interview petitioner McDaniel, an acknowledged expert on the archaeology of Lowes Island. (Rec., p. 028) This interview focused upon McDaniel's efforts to preserve the archaeological relics believed to lie within the island and the controversy over the Report. (Rec., pp. 018-019)

Parks' story appeared in the Loudoun Times on September 14, 1978. (Mem. Op., App. B, p. 12a). The article described McDaniel's work, the problems he encountered in unearthing the archaeological relics, and a description of them. (Rec., p. 011)

The article recited Iroquois' involvement in the governmental process and McDaniel's view of their work. Specifically, it reviewed the unorthodox methods employed by Iroquois researchers. "The Iroquois group did work in February and had a deadline to meet," the article said. "So instead of waiting for the earth to thaw, they went to work with jackhammers." Moreover, the article discussed McDaniel's opinion of Iroquois:

> "They recovered three or four artifacts, by accident," he said. "They ignored any kind of settlement plan." Further, McDaniel concluded "We already covered the ground they did. They don't have a good reputation in archaeological circles. They cut corners . . . ."

In the next edition of the newspaper, on September 21, 1978, the Loudoun Times published a clarification which stated that McDaniel's statement only related to Iroquois' work on the Lowes Island project.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS INSULATES FROM PUBLIC AND PRESS SCRUTINY AN ENTIRE CLASS OF PRIVATE CONSULTING FIRMS WHICH, UNDER FEDERAL ENVIRONMENTAL LEGISLATION, PERFORMS A CENTRAL ROLE IN THE GOVERNMENTAL DECISION MAKING PROCESS.

This Court has consistently held, in a line of cases beginning with *The New York Times Co. v. Sullivan,*[1] that when a person occupies a position which enables him to exert substantial influence or control over the outcome of governmental decisions, he is considered a "public official" or "public figure" and he must prove actual malice on the part of the defendant in order to recover damages in a libel case.[2]

At the trial court level in this case, Judge Bryan had found that Iroquois

> had substantial responsibility for and control over the conduct of the project embarked upon by the Water Authority at the Potomac River intake facility at Lowes Island. It prepared an inventory and evaluation of all known archaeological, historical and architectural resources at the project. It developed a mitigation plan to comply with federal regulations, and assisted the Water Authority by developing a management plan to preserve the mentioned resources in order to acquire a permit for construction from the Corps of Engineers. It prepared bidding specifications to enable the Water Authority to put into effect the management plan.

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[1] 376 U.S. 254 (1964).

[2] *E.g., Rosenblatt v. Baer,* 383 U.S. 75 (1966); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974).

This responsibility for or control over the project satisfies the standard set forth in *Rosenblatt* and *Gertz*. Clearly this plaintiff has so involved itself in public affairs that it should accept the "risk of closer public scrutiny" referred to in *Gertz*. It clearly has played "an influential role in ordering society," *Curtis Publishing Co. v. Butts*, 388 U.S. at 164 (Warren, C.J. concurring), quoted with approval in *Gertz, supra*, at 345, and it held "a position in government . . ." *Rosenblatt v. Baer, supra* at 86. The Court concludes that the plaintiff is indeed a public official within the meaning of the cases cited.[3]

Iroquois was hired to provide an essential element in the ultimate governmental decisions involving the location, configuration and licensing of the intake facility.[4] Iroquois' report was designed to assist FCWA and the Corps in choosing among several alternative locations for the facility, and was a mandatory step in the licensing process under the National Environmental Policy Act of 1969[5] ("NEPA") and the National Historic Preservation Act of 1966[6] ("NHPA"). Indeed, Iroquois was hired, in compliance with the statutory mandate, to perform a necessary governmental function for a governmental agency unable to perform it itself. For purposes of

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[3]Mem. Op., App. B, p. 15a.

[4]IROQUOIS RESEARCH INSTITUTE, THE CULTURAL RESOURCES OF LOWES ISLAND, VIRGINIA 3 and 112 (1978). This work shall be hereinafter referred to as "the Report".

[5]83 Stat. 852 (1969); 42 U.S.C. §§ 4321-4361 (1976).

[6]80 Stat. 915 (1966); 16 U.S.C. §§470-470t (1976). The analysis of the NHPA process in Appendix D explains the interlocking relationship between NEPA and NHPA. NHPA has a broader reach then NEPA in that it extends to any proposed or federally assisted undertaking including licensing. 16 U.S.C. §470f. NEPA on the other hand only applies to proposals for legislation and "major actions" significantly affecting the quality of the human environment. 42 U.S.C. §4332(c).

news reports concerning its performance of these governmental functions, Iroquois is no less a "public official" than a permanent employee of the same agency performing the same function would be.

Exclusion of consultants such as Iroquois from the reach of the *New York Times* Doctrine will have a "chilling effect" upon the nation's press in its coverage of their role in the governmental process. As this case demonstrates, the findings, recommendations and conclusions of these consultants influence the outcome of the governmental decision making process. By subjecting the public and press to the spectre of large damage awards when they probe and criticize the performance of these consultants, they and the agencies for whom they work will be shielded from significant public accountability. Failure to include governmental consultants such as Iroquois within the "public official" or "public figure" category will undermine the "central meaning" of the *New York Times* doctrine: "criticism of those responsible for government operations must be free, lest criticism of government itself be penalized."[7]

Congress, when it passed NEPA and NHPA, required the preparation of impact statements and reports such as the Iroquois study precisely for the purpose of fostering informed public debate on the environmental costs of proposed governmental activity.[8] Congress felt that this input was essential in ensuring

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[7] *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (discussing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). *See generally*, Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191.

[8] *S. Rep. No.* 91-296, 91st Cong., 1st Sess. (1969). The hearings on S. 1075, S. 237 and S. 1752 before the Senate Committee on Interior and Insular Affairs, stressed the importance of the environmental impact procedure to assure full and vigorous consideration of environmental values as an integral part of agency decision making. Senator Jackson underscored this purpose on the floor of the Senate, saying: "To insure that the

[footnote continued]

meaningful protection for the natural and cultural environment.[9] By requiring public notice and explicit mechanisms for public participation, Congress reflected its concern that federal agencies might yield to the temptation "to get on with the job" rather than engage in the deliberative analytical processes mandated by NEPA and NHPA. In short, Congress deliberately created an elaborate system of analysis and public disclosure to assure that federal agencies "use all practicable means and measures"[10] to protect environmental values.

The Fourth Circuit opinion in this case jeopardizes the implementation of this Congressional intent. Its opinion fails to apply the policy considerations of *New York Times* to the environmental impact statement process and the role of consultants in it. The practical effect of its decision is to exclude categorically all consultants who participate in these processes from the reach of the *New York Times* doctrine.

An essential prerequisite to the effective functioning of these processes is the broad public participation and debate envisioned by Congress.[11] Such participation and debate depends upon public awareness of the issues and values at stake. Unquestionably, media coverage constitutes an indispensable mechanism for creating such public awareness. The more searching

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policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government, the act also established some important 'action forcing' procedures." 115 *Cong. Rec.* 40416 (1969).

[9]National Environmental Policy Act of 1969, 42 U.S.C. §4332. NEPA extends its protection to both the natural and cultural environment, and states as one of its aims the preservation of "important historic, cultural, and natural aspects of our national heritage. . . ." 42 U.S.C. §4331.

[10]42 U.S.C. §4331. *Cf.* 7 C.F.R. §799.6(d)(2) (1980) (NEPA Guidelines, Department of Agriculture). "It is an objective of the USDA to involve the public in developing its policies and in formulating and implementing its programs. To assist in accomplishing these objectives, the agency will utilize timely and effective procedures such as public metings, news media. . . ."

[11]See note 8, *supra.*

and penetrating coverage the press gives to these processes, the greater the prospect that Congressional intent will be vindicated.

In this case, the Corps of Engineers delegated important compliance requirements of NEPA to FCWA, which it then "contracted out" to Iroquois.[12] Specifically, Iroquois identified properties within the area of the sites under construction for the facility which were significant historic or archaeological resources. It inventoried and evaluated historical and cultural resources located within the environmental impact area; contended that other sites under consideration for the facility offered no better alternatives; and proposed a mitigation plan to minimize the adverse effects of construction of the facility.[13]

Iroquois' report met with stinging criticisms. These ranged from accusations that it duplicated work already performed by McDaniel[14] and claims that it used shoddy methods in conducting its inventory,[15] to assertions that it failed to consider fully other measures which would have more effectively reduced the adverse effect upon the endangered archaeological resources.[16]

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[12]See *U.S. Army Corps of Engineers, Final Environmental Impact Statement Concerning Proposed Potomac River Water Supply Structure* (1978).

[13]Report pp. ix-x (App. E, pp. 45a-47a).

[14]Letter from William M. Kelso, Commissioner, Virginia Research Center for Archaeology, to James J. Corbalis, FCWA, dated June 28, 1978 (Rec., p. 051).

[15]Letter from John G. Lewis to Col. G.K. Withers, District Engineer, dated June 27, 1978 (Rec. p. 054).

[16]See Kelso Letter, note 14, *supra*.

Iroquois' relationship with FCWA was not atypical.[17] FCWA hired it to perform functions mandated by NEPA and NHPA and implementing regulations[18]. These regulations expressly authorize government agencies to employ experts to assist them in complying with environmental impact statement requirements under NEPA and the comment and review process under NHPA where the agency lacks such expertise or personnel within its own staff.[19] Where a consultant is hired to provide professional expertise and technical skill beyond the competence of the contracting agency, such consultants, consistent with the mandate of environmental impact statement regulations and NHPA regulations, invariably make recommendations and value judgments just as Iroquois did here.[20]

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[17] A number of excellent texts describe the typical relationship between government agencies and contract archaeologists. See generally KING, PRESERVATION LAW AND THE CONTRACT ARCHAEOLOGIST – METHODS OF EVALUATING AND REPORTING, (New York Archaeological Council, Rev. Ed. 1977); KING, HICKMAN & BERG, . ANTHROPOLOGY IN HISTORIC PRESERVATION 65-83 (1977); SCHIFFER & GUMERMAN, CONSERVATION ARCHAEOLOGY 3-16 (1977).

[18] Report, pp. 3, 112.

[19] Appendix C contains a sampling of regulations promulgated by various federal agencies pursuant to 42 U.S.C. §4333. That enactment directs all federal agencies to conform these regulations, policies and procedures with the mandate of NEPA. For clarity and continuity, petitioners have relegated pertinent citations of regulations governing the comment and review process under NEPA and NHPA to the Appendix. A narrative description of this entire process appears in Appendix D and pertinent text of the NHPA regulations of the Advisory Council on Historic Preservation appears in Appendix C.

[20] See, *e.g.*, BENVENISTE, THE POLITICS OF EXPERTISE (2d ed. 1977).

Whether the field involves archaeology or physics, ecology or biology, value judgments inevitably come into play in the findings, recommendations and conclusions of experts who participate in these processes.[21] The complex technical and scientific issues raised generate disagreement even among "the experts" over methodology, interpretation of data and the proper role and function of experts.[22]

In the wake of the Fourth Circuit's opinion, that broad participation which Congress considered essential to the effectiveness of the environmental impact statement process and the NHPA comment and review process will be stifled. The appellate opinion will inhibit free expression by knowledgeable

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[21] Responsible scholars in the field of contract archaeology have identified a wide range of value judgments which they regularly exercise in NHPA work: the determination of "significance"; choosing between preservation in place for further study vs. "salvage" for laboratory study; balancing professional standards and economic considerations; and telling the client what it wants to hear so as to assure future business, are some of the areas of concern. See generally sources cited in note 17, *supra*. See also REDMAN, BERMAN, CURTIN, LANGHORNE, VERSAGGI & WANSER, SOCIAL ARCHAEOLOGY (1978); MUSEUM OF NORTHERN ARIZONA, TECHNICAL SERIES NO. 14, PROCEEDINGS OF THE 1974 CULTURAL RESOURCE MANAGEMENT CONFERENCE (1974); ARLIE HOUSE REPORT, THE MANAGEMENT OF ARCHAEOLOGY RESOURCES (1977).

[22] The current popular belief is that the domain of politics is the exclusive responsibility of the politician, while the expert is exclusively concerned with facts and rationality. But the actual behavior of experts is more complex and does not fit these expectations. We find in practice that experts do exercise power of their own. A modern prince does not completely control his experts, even though they depend on him since he hires and fires them. But there exist many subtle ways to evade and influence a prince and these are not unknown to the successful pundit.

BENVENISTE, *op. cit., supra* note 20, at 6.

members of the public such as McDaniel about other experts who play an official role in these processes.[23]

Congress envisioned a statutory scheme under which the government must explain and justify the environmental impact of its policy choices. Moreover, it anticipated that these explanations and justifications would be subject to searching review and criticism by the public at large. Those responsible for performing these functions on behalf of government must, therefore, expect to have their work scrutinized, their methods challenged, and their conclusions questioned. Under *New York Times* and its progeny, moreover, those responsible for performing these governmental functions must be classified as "public officials" or "public figures." To do otherwise would betray the "profound natural commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that [it] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government."[24] The constitutional policy of encouraging public discussion in the *New York Times* line of cases parallels the legislative policy of encouraging public discussion in the environmental impact statement process – yet the same degree of public discussion cannot occur in the latter case unless the protections of the former are extended to it. In other words, the *New York Times* doctrine must be applied to those participants in the process who actually or potentially influence government policy. The Fourth Circuit's opinion has left a miasma of doubt over whether such a full airing of these important questions can

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[23] In his general comments . . . [a fellow archaeologist] alludes to the fear among archaeologists of being sued by their colleagues and found liable for slander . . . . This appears to be a growing problem; some archaeologists are flatly afraid to criticize their fellows for fear a law suit will result.

King, *Preservation and Rescue*, 7 *J. Field Archaeology* 125, 131 (1980).

[24] *The New York Times Co. v. Sullivan*, 376 U.S. at 270.

continue in the environmental impact statement process under NEPA and the comment and review process under NHPA. Accordingly this court should grant a writ of certiorari in this case.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 79-1121

Arctic Company, LTD, t/a Iroquois Research Institute,

Appellant,

v.

Loudoun Times Mirror; Kyle Parks; R. E. McDaniel,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division. Albert V. Bryan, Jr., District Judge.

Argued: January 9, 1980 Decided: July 3, 1980

Before FIELD, Senior Circuit Judge, RUSSELL and SPROUSE, Circuit Judges.

H. Neil Garson (Daniel R. Kane, Michael A. Mays, Kenneth R. Weiner, Garson, de Member & Weiner; Daniel R. Kane on brief) for Appellant; Michael S. Horwatt (Thomas S. Kenny, Wyatt B. Burrette, Jr., [sic] Horwatt, Kenny, Glennon, Goodman & Schultz; Chess, Durrett [sic] & Roeder, P.c. on brief) for Appellees.

SPROUSE, Circuit Judge:

This is an appeal by Artic [sic] Co. Ltd. t/a Iroquois Research Institute (Iroquois) from the order of the district court granting summary judgement for the defendants in a libel action. The suit was brought against Loudoun Times Mirror (Mirror), a newspaper published in Loudoun County, Virginia, Carl [sic] Parks (Parks), a Mirror reporter, and R. E. McDaniel (McDaniel), an amateur archaeologist, and was based on an article written by Parks and published in the Mirror on September 14, 1978. The article concerned a proposed project on Lowes Island. Iroquois claimed that false statements in that article, attributed to McDaniel, had damaged its professional reputation.

The Fairfax County Water Authority, wishing to increase its water supply, sought a permit from the Army Corps of Engineers for construction of water intake facilities on Lowes Island, which is located in the Potomac River in the Loudoun County, Virginia area. The permit application required an inventory and evaluation of all known archaeological, historical, and architectural resources on Lowes Island and a plan to preserve the archaeological and historical resources. Iroquois, an independent company engaged in historical and archaeological research, was contacted in January, 1978, by the Water Authority to undertake this inventory and evaluation and design the mitigation plan. Iroquois had conducted numerous archaeological research projects for private business and other government agencies in various parts of the country and was performing work in seven different states on twenty different "cultural resource" assignments during the period in which it worked on Lowes Island. It commenced the project in January, 1978, despite severe weather problems, and five months later, the project was completed with a report to the Water Authority. Iroquois was then hired for one additonal month to prepare bidding specificatons for management of the Island's resources.

(The Water Authority's application was successful and the permit was subsequently granted.)

Lowes Island is an island of considerable historical and archaeological value. It is also the center of a considerable rezoning controversy. The impending acquistion of a large part of the island by a private developer, and the efforts of that developer to rezone the land for commercial use, had created considerable conflict among developers, citizens in the area, and history buffs.

As a result of this land development conflict the Mirror, in September, 1978, assigned Parks to write a story on the archaeological explorations on Lowes Island. Parks, at the time of the assignment, knew nothing of Iroquois. After making inquiries among his colleagues at his newspaper, Parks was informed that McDaniel had a reputation as an archaeological expert. McDaniel was a United States Government employee and an amateur archaeologist. He had worked on Lowes Island pursuing his archaeological avocation and was known in the community as an authority on Lowes Island.[1] Parks interviewed McDaniel while he was engaged in archaeological explorations on Lowes Island. Parks' story, based on the McDaniel interview, was published in the defendant Mirror on September 14, 1978. In the report Parks quoted McDaniel as saying, among other things:

> "The Iroqois (sic) group was commissioned by the Fairfax County Water Authority which is building a water intake on the island."
>
> "The Iroqois (sic) group did the work in February and had a deadline to meet. So instead of waiting for the earth to thaw, they went to work with jackhammers."

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[1] Contrary to Iroquois' contentions, there is no evidence that McDaniel had been competing with Iroquois for the Fairfax County Water Authority contract.

" 'They recovered three or four artifacts by accident,' he said. 'They ignored any kind of settlement plan.' "

"It's not much of a plan at all, McDaniel thinks."

" 'We had already covered the ground they did,' he said. 'They don't have a good reputation in archaeological circles. They cut corners.' "

After the publication of the article, McDaniel contacted the newspaper advising them that he had not made the statement concerning Iroquois' reputation. Thereafter, seven days later, on September 21, the defendant Mirror published a clarification:

"In a September 14 article on pg. C-1 entitled 'McDaniel: Archaeologist Against Bulldozers', one of R. E. McDaniel's quotes was unfortunately taken out of context.

McDaniel was describing the work of Iroquois Research Institute at Lowes Island when he said the Institution had a bad reputation and cut corners. McDaniel was only talking about the Institutes' work on the Island and not its general operations."[2]

John G. Lewis, a personal acquaintance of McDaniel and an authority on the history of Loudoun County and the county's representative to the Virginia Historical Landmarks Commission, wrote a letter on June 27, 1978, to the Corps of Engineers complaining about the quality of Iroquois' work. William M. McKelso [sic], a commissioner of the Virginia Research Center for archaeology, wrote the Water Authority on

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[2]McDaniel, in his affidavit filed in connection with the motion for summary judgment, said in part:

"Mr. Parks misquoted me with respect to the statements alleged in paragraph 2 of plaintiffs' motion for summary judgment in that I did not say: 'They . . . (Iroquois) don't have a good reputation in archaeological circles. They cut corners."

June 28, complaining that Iroquois' report contained insufficient information. He also stated that part of the research was not necessary because Iroquois had been given the results of McDaniel's archaeological research. Parks asserts in his affidavit that he became aware of this information during his preparation of the article.

The trial court found that Iroquois was not a public figure, but was a public official under the guidelines of *Rosenblatt v. Baer*, 383 U.S. 75 (1966), and could not recover in a libel action unless it proved actual malice or a reckless disregard for the truth on the part of defendants. The Court further held that, on the basis of the pleadings and the affidavits, there was no genuine issue of material fact concerning malice. and granted summary judgment for defendants.

Iroquois contends that it is neither a public figure nor a public official. Alternatively, it claims that defendant McDaniel's denial of the crucial statement attributed to him by the reporter created an interference that, if the news story was in part contrived, Parks "had serious doubts" about the veracity of that part of the story. This was sufficient proof of malice for jury consideration under the criteria of *St. Amant v. Thompson*, 390 U.S. 727 (1968). It also contends that McDaniel competed with it professionally, creating a permissible interference of malice on his part. Thus, Iroquois argues that there exists material issues of fact as to malice, and summary judgment was inappropriate.

Defendants, on the other hand, contend that Iroquois is either a public figure or a public official and thus cannot recover unless malice on the part of defendants is proved by clearly convincing evidence. They claim that Iroquois' only counter-affadavit in the summary judgment proceedings contained nothing indicating that the Lewis and McKelso letters, together with the information received concerning the reliability of McDaniel, gave Parks a sufficient basis for writing the

story, and demonstrate that there was no malice or reckless diregard for the truth.

Since we conclude that Iroquois is not a public official, we reverse the summary judgment. In view of our holding that Iroquois is a private person for libel litigation purposes, it is not necessary to reach plaintiffs' contention that there are material issues of fact as to the question of malice by defendants.

We agree with the trial court that Iroquois is not a public figure in the libel context. It was not generally known in the community – in fact the defendant news reporter only became aware of its identity during the preparation of the news story – and did not "press itself" into the public controversy over the use of Lowes Island. It merely performed a narrowly-defined professional service in a highly technical field. This background and activity does not fit the definition of a public figure. *See Wolston v. Reader's Digest Association,* 443 U.S. 157 (1959); *Hutchinson v. Proxmire,* 443 U.S. 111 (1979); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967).

Neither is Iroquois a public official under the law of libel. *New York Times v. Sullivan,*[3] in requiring proof of malice by a public official libel plaintiff, was silent as to the inclusiveness of that catagory [sic]. Two years later, however, the court in *Rosenblatt v. Baer*[4] directly considered the term. Justice Brennen [sic], writing for the majority, explained:

> [T]he "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs . . . [footnote omitted].

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[3] 376 U.S. 254 (1964).

[4] 383 U.S. 75 (1966).

> . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply . . . [footnote omitted].

Id. at 85-86.

> It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

Id. at 87 n. 13.

The *Rosenblatt* characterization of a *New York Times* public official has not been modified and in our view fits well into the framework of competing values created by libel litigation. Testing Iroquois status under the criteria of *Rosenblatt,* we conclude that it has not relinquished its status as a private business enterprise by entering into the type of government and political activities that would set it apart as an entity that must be closely scrutinized by the press.

Iroquois was employed as a consultant by the Fairfax County Water Authority for two periods lasting a total of six months. Its role was solely that of a scientific fact-finder, merely reporting to its principal, the Water Authority, the archaeological facts as found. It had no control over the conduct of government affairs. It made no recommendations, participated in no policy determinations, and exercised no discretion. Its position was

not of such apparent importance that the public has an independent interest in its qualifications beyond the general interests in the qualifications and performance of all government employees or consultants. Iroquois' position invited public scrutiny and discussion only insofar as it became part of the discussion occasioned by the unrelated controversy involving the rezoning of Lowes Island. While the proposed water intake facility did cause concern among some citizens in the area, such as members of the Virginia Historic Landmarks Commission, the principal controversy, and the impetus for the controverted article, remained the question of the commercial development of Lowes Island.

There well may be circumstances in which a consultant employed by a government entity could be classified as a public official. We can perceive no rationale, however, under which Iroquois should lose its status as a private business enterprise. Even had it been a permanent Water Authority employee, it is doubtful that Iroquois could have been classed as a public official under the *Rosenblatt* standards. Its internal structure as a consultant available to business and government alike, the short duration of its employment, its function as purely a fact-finder exercising no judgment or discretion mitigate further against Iroquois' classification as a public official.

We therefore reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

ARTIC COMPANY, LTD., t/a Iroquois Research Institute, Plaintiff,	)	
V.	)	CIVIL ACTION NO. 78-786-A
LOUDOUN TIMES MIRROR, et al., Defendants.	)	
ARTIC COMPANY, LTD., t/a Iroquois Research Institute, Plaintiff,	)	
V.	)	CIVIL ACTION NO. 78-817-A
R. E. McDANIEL, Defendant.	)	

MEMORANDUM OPINION

These are actions for libel. Originally filed in the Circuit Court of Loudoun County, Virginia, they were removed to this Court pursuant to 28 U.S.C. § 1441 (1970), the defendants asserting that there was original jurisdiction in this Court pursuant to 28 U.S.C. § 1332 (1970) (diversity), and 28 U.S.C. § 1331 (1970) (federal question).[1]

[1] The Court's diversity jurisdiction is premised on the plaintiff's citizenship in Alaska and the defendant's citizenship in Virginia. The pleadings reveal that while the plaintiff is an Alaska corporation it has "domesticated" in Virginia. The plaintiff has not resisted removal or

[footnote continued]

The matter was heard on December 15, 1978, on defendants' motions for summary judgment, which assert that under the circumstances of the case there is lacking the actual malice which the plaintiff must prove under the standards set down in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The plaintiff responds by saying that he is not a public official or public figure so as to call into play such a standard of proof.

The material facts which the Court finds not to be genuinely in dispute are these:

(1) The plaintiff is a corporation engaged in historical and archaeological research (Complaint ¶ 1).

(2) The defendant Loudoun Times Mirror is a newspaper owned and published by Loudoun Times Publishing Co., Inc. (Aff. Brannon, ¶ 4).

(3) The defendant Kyle Parks is a reporter for the Loudoun Times Mirror and wrote the alleged defamatory article (Aff. Parks, ¶ 2).

(4) The defendant R. E. McDaniel is the person to whom the allegedly defamatory remarks are attributed.

(5) The Fairfax County Water Authority (Water Authority), an agency of the County of Fairfax, Virginia, had selected Lowes Island in Loudoun

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questioned the Court's jurisdiction, and the voluntariness of the domestication has not been made an issue. Va. Code Ann. §13.1-102 (1978 Repl. Vol.) requires a certificate of authority to be procured by a foreign corporation before it can do business in Virginia. Presumably this is what the plaintiff has done. While there is some contrariety of views as to whether such action makes the plaintiff a Virginia citizen for diversity purposes, in the Fourth Circuit it apparently does not. *Rudisill v. Southern Rwy. Co.*, 548 F.2d 488 (4th Cir. 1977). The Court assumes, therefore, that it would have had original diversity jurisdiction. There is of course no original federal question jurisdiction, since the federal question is only in the case as a defense to plaintiff's non-federal libel claims.

County, Virginia, as a site for a controversial Potomac River intake facility (Aff. Parks, ¶ 3).

(6) Lowes Island lies at the northeastern tip of Loudoun County and juts into the Potomac River. While Lowes Island has many unique aspects, it has become the focal point for public concern because of the archaeological treasures believed to lie beneath its surface, which consist of Indian relics possibly dating back as far as 12,000 B.C.

(7) The historic character of the area has created considerable public interest in privately owned land and has set the stage for a series of conflicts involving property owners, developers, citizens, history buffs, and the government of the United States, the Commonwealth of Virginia, the County of Loudoun and the County of Fairfax.

(8) After the Water Authority selected Lowes Island as the site for the intake facility, because of public pressure and federal law, the United States Army Corps of Engineers has required that the Fairfax County Water Authority ascertain the impact upon the historic and cultural heritage of the area as a condition to issuing a permit to the Fairfax County Water Authority. Concerns about the water intake facility have prompted the involvement of various state and local elected public officials, the Virginia Historic Landmarks Commission; the American Association of University Women, Loudoun County Chapter; and Loudoun County's representative to the Virginia Historic Landmarks Commission.

(9) During 1978, the Fairfax County [sic] engaged the plaintiff on two occasions:

(a) From early January to late May to prepare an inventory and evaluation of all known archaeological, historical and architectural resources at their project area at Lowes Island; to publish the results; and

to develop a mitigation plan which would comply with federal regulations and assist the Water Authority by developing a management plan to preserve these resources in order to acquire a permit for construction from the Corps of Engineers. This was successfully completed. The permit was granted.

(b) From mid-July to mid-August to prepare bidding specifications to enable the Water Authority to put into effect the management plan accepted by the United States government and for which the Commonwealth of Virginia agreed. This was successfully completed. (Aff. Poirier, ¶ 3.)

(10) On September 14, 1978, the defendant Loudoun Times Mirror published in its newspaper an article, written by Parks which quoted one R. E. McDaniel as saying:

> "They [Iroquois Research Institute] don't have a good reputation in archaeological circles. They cut corners." (Ex. 1 to Defendants' Answer.)

(11) That the article further quoted McDaniel as saying ". . . removed three or four artifacts by accident;" ". . . ignored any kind of settlement plan;" and "we [McDaniel] had already covered the ground they did." *Id.*

(12) On September 21 a "clarification" was published which stated that McDaniel's statement only related to plaintiff's work on the Lowe's Island project, not to plaintiff's general reputation (Ex. C to aff. of Parks).

(13) That there was no actual malice present on the part of the defendants. Parks did not know that any of the allegedly defamatory statements were false and there is absolutely no showing of any circumstance from which it might be inferred that he or the newspaper published the article in reckless disregard of whether it was true or false. The allegedly false statements are those Parks attributes in the article to McDaniel. McDaniel's integrity

and proficiency as an archaeologist were vouched for to Parks prior to the publication by apparently reliable persons. A clarification of McDaniel's remarks, published a week later on September 21, further negates any suggestion of deliberate falsity or recklessness.

* * *

New York Times established the requirement of actual malice for actions brought by public officials. The requirement was extended to "public figures" in *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967). For a time, following the plurality opinion in *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971), the requirement of actual malice was thought to depend on the degree of newsworthiness of the subject matter. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this approach was abandoned and the requirement of actual malice was held to depend upon the character of the allegedly defamed plaintiff. *Anderson v. Stanco Sports Library, Inc.* 542 F.2d 638, 640, n.2 (4th Cir. 1976).

There is, in the Court's view, no evidence here that the plaintiff is a "public figure." The Court's inquiry then is confined to whether the plaintiff is a public official.

In this connection the language of the Court in *Gertz* is instructive:

> The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
>
> More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a

compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in *Garrison v. Louisiana*, 379 U.S. at 77, the public's interest extends to "anything which might touch on an official's fitness for office . . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Id.* at 344-345.

Appropriate also, and seemingly undisturbed by *Gertz's* limitation on *Rosenbloom*, is the Court's language in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966):

> There is . . . second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those [public] issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government be penalized. It is clear, therefore, that the "public official" designation applies *at the very least* to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. (Emphasis supplied).

See also, Hutchinson v. Proxmire, 431 F. Supp. 1311, 1327 (W.D. Wis. 1977).

The defendants' reliance on *Adey v. United Action for Animals, Inc.*, 361 F. Supp. 457 (S.D.N.Y. 1973), *aff'd.*, 493 F.2d 1397 (2nd Cir. 1974), is not entirely misplaced. It is true that that case was decided after *Rosenbloom* and before *Gertz*, and

relied in part upon the former for its result. There too the defendant conceded that the plaintiff was a public figure. But the Court also found that the plaintiff as a consultant to NASA and in view of his leadership in the preparation of the monkey for the flight, was a public official (as distinguished from a public figure).

The plaintiff here occupies a position similar to that of Adey. According to the affidavit of its own director and general manager, it had substantial responsibility for and control over the conduct of the project embarked upon by the Water Authority at the Potomac River intake facility at Lowes Island. It prepared an inventory and evaluation of all known archaeological, historical and architectural resources at the project. It developed a mitigation plan to comply with federal regulations, and assisted the Water Authority by developing a management plan to preserve the mentioned resources in order to acquire a permit for construction from the Corps of Engineers. It prepared bidding specifications to enable the Water Authority to put into effect the management plan.

This responsibility for or control over the project satisfies the standard set forth in *Rosenblatt* and *Gertz*. Clearly this plaintiff has so involved itself in public affairs that it should accept the "risk of closer public scrutiny" referred to in *Gertz*. It clearly has played "an influential role in ordering society." *Curtis Publishing Co. v. Butts*, 388 U.S. at 164 (Warren, C. J. concurring), quoted with approval in *Gertz, supra*, at 345, and it held "a position in government . . . [with] such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it . . . ." *Rosenblatt v. Baer, supra* at 86. The Court concludes that the plaintiff is indeed a public official within the meaning of the cases cited.

A remaining issue concerns the applicability of the *New York Times* standard to a plaintiff who is not a natural person but a corporation. Other courts have disagreed as to the distinction, if any, between the interest in reputation of corporations and individuals. *See, e.g., Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 819 (N.D. Calif. 1977); *Martin*

Marietta Corp v. Evening Star Newspaper, 417 F. Supp. 947, 955 (D.D.C. 1976).

In *Martin Marietta*, for example, the court held that the rule in *Rosenbloom v. Metromedia, Inc., supra*, which eschewed any distinction between libel actions instituted by public plaintiffs and those brought by private plaintiffs for purposes of the malice standard, should apply to corporations because "the values considered important enough to merit accommodation with interests protected by the first amendment are associated solely with natural persons, and that corporations, while legal persons for some purposes, possess none of the attributes the court sought to protect." *Id.* at 955.

The Court rejects this reasoning because it creates an unwarranted artificial distinction between individuals and corporations. The decision in *Gertz* did not simply accommodate values that are unique to natural persons. The legitimate state interest in compensating individuals for the harm inflicted on them by defamatory falsehoods, which was in *Gertz* restricted by the need to avoid self-censorship by the news media, extends to protection of corporate reputations as well. Both natural persons and corporations have an interest in maintaining a reputation undistorted by defamatory falsehoods and each has, in its capacity as a public official, an equal opportunity to take advantage of the "self-help" remedies recognized by the *Gertz* court as available to public officials. *Gertz v. Robert Welch, Inc., supra* at 344-45. Moreover, individuals and corporations who become "public officials" within the meaning of *Gertz* uniformly must accept the necessary consequences, such as heightened public scrutiny of involvement in public affairs. While accepting these risks, any public official, individual or corporation, has an interest in maintaining a good reputation. The inherent differences between the character of an individual reputation and a corporate reputation are unrelated to the interest in compensating any party whose reputation is impugned for the damage inflicted by defamatory falsehoods. The Court is unpersuaded that the different character of individual and corporate reputations justifies exclusion of a corporate plaintiff

from the "public official" classification where, as here, that plaintiff exhibits the requisite degree of involvement in governmental affairs to warrant the lessened protection against defamation which under *Gertz* is a necessary consequence of that participation. Therefore the Court concludes that the considerations that prompted the *Gertz* Court to adopt the malice standard in defamation actions by public officials apply in equal measure to individual and corporate plaintiffs.

Nor is the Court persuaded by plaintiff's argument that there is a distinction between a media defendant such as Loudoun Times Mirror and a private defendant such as McDaniel. While there is language in *Gertz* addressed to the protections to which communications media are entitled, this is because the defendant in that case was a publisher. But no case has been cited which turns on the character of the entity which is the alleged defamer, as opposed to the character of the one allegedly defamed.

The foregoing is dispositive of the case, for there is no showing sufficient to carry to trial the case on an issue of actual malice. Indeed, at oral argument the plaintiff conceded this.

Accordingly, summary judgment will be awarded the defendants.

/s/ Albert V. Bryan, Jr.

United States District Judge

Alexandria, Virginia
December 18th, 1978

APPENDIX C

EXCERPTS FROM NATIONAL HISTORIC PRESERVATION ACT OF 1966, 16 U.S.C. §§470-470t (1976):

§ 470. Congressional finding and declaration of policy

The Congress finds and declares—

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and

(d) that, although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

(Oct. 15, 1966, P.L. 89-665, § 100, 80 Stat. 915.)

§ 470a. National Register; grants for comprehensive surveys; matching grants-in-aid to National Trust for Historic Preservation in the United States; nondisclosure of location information relating to sites and objects; risk of destruction; definitions

(a) The Secretary of the Interior is authorized—

(1) to expand and maintain a national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, and culture, hereinafter referred to as the National Register, and to grant funds to States for the purpose of preparing comprehensive statewide historic surveys and plans, in accordance with criteria established by the Secretary, for the preservation, acquisition, and development of such properties;

§ 470f. Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act . . . a reasonable opportunity to comment with regard to such undertaking.

(Oct. 15, 1966, P.L. 89-665, Title I, § 106, 80 Stat. 917; Sept. 28, 1976, P.L. 94-422, Title II, § 201(3), 90 Stat. 1320.)

EXCERPTS FROM NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 42 U.S.C. §§4321-4361 (1976):

§ 4321. Congressional declaration of purpose

The purposes of this Act [42 USC §§4321 et seq.] are: To declare a national policy which will encourage productive and

enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

(Jan. 1, 1970, P.L. 91-190, § 2, 83 Stat. 852.)

§ 4331. Congressional declaration of national environmental policy

(b) In order to carry out the policy set forth in this Act, [. . .] it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may [. . . .]

§ 4332. Cooperation of agencies—Reports—Availability of information—Recommendations—International and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . ., and (2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with an obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code . . ., and shall accompany the proposal through the existing agency review processes;

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act . . . and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act . . .

(Jan. 1, 1970, P.L. 91-190, Title I, § 103, 83 Stat. 854.)

EXECUTIVE ORDER NO. 11593:

Protection and enhancement of the cultural environment. Ex. Ord. No. 11593 of May 13, 1971, 36 Fed. Reg. 8921, provide:

"By virtue of the authority vested in me as President of the United States and in furtherance of the purposes and policies of the National Environmental Policy Act of 1969 (83 Stat. 852, 42 U.S.C. 4321 et seq.), the National Historic Preservation Act of 1966 (80 Stat. 915, 16 U.S.C. 470 et seq.), the His-

toric Sites Act of 1935 (49 Stat. 666, 16 U.S.C. 461 et seq.), and the Antiquities Act of 1906 (34 Stat. 225, 16 U.S.C. 431 et seq.), it is ordered as follows:

"*Sec. 1. Policy.* The Federal Government shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation. Agencies of the executive branch of the Government (hereinafter referred to as "Federal agencies") shall (1) administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations, (2) initiate measures necessary to direct their policies, plans and programs in such a way that federally owned sites, structures, and objects of historical, architectural or archaeological significance are preserved, restored and maintained for the inspiration and benefit of the people, and (3), in consultation with the Advisory Council on Historic Preservation (16 U.S.C. 470i), institute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of nonfederally owned sites, structures and objects of historical, architectural or archaeological significance.

"*Sec. 2. Responsibilities of Federal agencies.* Consonant with the provisions of the acts cited in the first paragraph of this order, the heads of Federal agencies shall:

"(a) no later than July 1, 1973, with the advice of the Secretary of the Interior, and in cooperation with the liaison officer for historic preservation for the State or territory involved, locate, inventory, and nominate to the Secretary of the Interior all sites, buildings, districts, and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places.

"(b) exercise caution during the interim period until inventories and evaluations required by subsection (a) are completed to assure that any federally owned property that might qualify for nomination is not inadvertently transferred, sold, demolished or substantially altered. The agency head shall refer any questionable actions to the Secretary of the Interior for an opinion respecting the property's eligibility for inclusion on the National

Register of Historic Places. The Secretary shall consult with the liaison officer for historic preservation for the State or territory involved in arriving at his opinion. Where, after a reasonable period in which to review and evaluate the property, the Secretary determines that the property is likely to meet the criteria prescribed for listing on the National Register of Historic Places, the Federal agency head shall reconsider the proposal in light of national environmental and preservation policy. Where, after such reconsideration, the Federal agency head proposes to transfer, sell, demolish or substantially alter the property he shall not act with respect to the property until the Advisory Council on Historic Preservation shall have been provided an opportunity to comment on the proposal.

"(c) initiate measures to assure that where as a result of Federal action or assistance a property listed on the National Register of Historic Places is to be substantially altered or demolished, timely steps be taken to make or have made records, including measured drawings, photographs and maps, of the property, and that copy of such records then be deposited in the Library of Congress as part of the Historic American Buildings Survey or Historic American Engineering Record for future use and reference. Agencies may call on the Department of the Interior for advice and technical assistance in the completion of the above records.

"(d) initiate measures and procedures to provide for the maintenance, through preservation, rehabilitation, or restoration, of federally owned and registered sites at professional standards prescribed by the Secretary of the Interior.

"(e) submit procedures required pursuant to subsection (d) to the Secretary of the Interior and to the Advisory Council on Historic Preservation no later than January 1, 1972, and annually thereafter, for review and comment.

"(f) cooperate with purchasers and transferees of a property listed on the National Register of Historic Places in the development of viable plans to use such property in a manner compatible with preservation objectives and which does not result in an unreasonable economic burden to public or private interests.

"*Sec. 3. Responsibilities of the Secretary of the Interior.* The Secretary of the Interior shall:

"(a) encourage State and local historic preservation officials to evaluate and survey federally owned historic properties and, where appropriate, to nominate such properties for listing on the National Register of Historic Places.

"(b) develop criteria and procedures to be applied by Federal agencies in the reviews and nominations required by section 2(a). Such criteria and procedures shall be developed in consultation with the affected agencies.

EXCERPTS FROM ADVISORY COUNCIL ON HISTORIC PRESERVATION FINAL REGULATIONS ON PROTECTION OF HISTORIC AND CULTURAL PROPERTIES, 36 C.F.R. PART 800

§ 800.3 Criteria of effect and adverse effect.

The following criteria shall be used to determine whether an undertaking has an effect or an adverse effect in accordance with these regulations.

(a) *Criteria of Effect.* The effect of a Federal, federally assisted or fedeally licensed undertaking on a National Register or eligible property is evaluated in the context of the historical, architectural, archeological, or cultural significance possessed by the property. An undertaking shall be considered to have an effect whenever any condition of the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural characteristics that qualify the property to meet the criteria of the National Register. An effect occurs when an undertaking changes the integrity of location, design, setting, materials, workmanship, feeling, or association of the property that contributes to its significance in accordance with the National Register criteria. *An* effect may be direct or indirect. Direct effects are cuased by the undertaking and occur at the same time and place. Indirect effects include those caused by the undertaking that are later in time or farther removed in distance, but are still reasonably foreseeable. Such effects may include changes in the pattern of land use, population density or growth rate that may affect on properties of historical, architectural, archeological, or cultural significance.

(b) *Criteria of Adverse Effect.* Adverse effects on National Register or eligible properties may occur under conditions which include but are not limited to:

(1) Destruction or alteration of all or part of a property;
(2) Isolation from or alteration of the property's surrounding environment;
(3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;
(4) Neglect of a property resulting in its deterioration or destruction.
(5) Transfer or sale of a property without adequate conditions or restrictions regarding preservation, maintenance, or use.

Review of Individual Undertakings

§ 800.4 Federal Agency responsibilities.

As early as possible before an agency makes a final decision concerning an undertaking and in any event prior to taking any action that would foreclose alternatives or the Council's ability to comment, the Agency Official shall take the following steps to comply with the requirements of Section 106 of the National Historic Preservation Act and Section 2(b) of Executive Order 11593. It is the primary responsibility of each Agency Official requesting Council comments to conduct the appropriate studies and to provide the information necessary for an adequate review of the effect a proposed undertaking may have on a National Register or eligible property, as well as the information necessary for adequate consideration of modifications or alterations to the proposed undertaking that could avoid, mitigate, or minimize any adverse effects It is the responsibility of each Agency Official requesting consultation with a State Historic Preservation Officer under this section to provide the information that is necessary to make an informed and reasonable evaluation of whether a property meets National Register criteria and to determine the effect of a proposed undertaking on a National Register or eligible property. Although a Federal agency may require non-Federal parties to undertake certain

steps required by these regulations as a prerequisite to Federal action and may authorize non-Federal participation under this section and in the consultation process under § 800.6 pursuant to approved counterpart regualations, the ultimate responsiblity for complaince with these regulations remains with the Federal agency and cannot be delegated by it.

(a) *Identification of National Register and Eligible Properties.* It is the responsibility of each Federal agency to identify or cause to be identified any National Register or eligible property that is located within the area of the undertaking's potential environmental impact and that may be affected by the undertaking.

(1) The Agency Official shall consult the State Historic Preservation Officer, the published lists of National Register and eligible properties, public records, and other individuals or organizations with historical and cultural expertise, as appropriate, to determine what historic and cultural properties are known to be within the area of the undertaking's potential environmental impact. The State Historic Preservation Officer should provide the Agency Official with any information availabe on known historic and cultural properties identified in the area (whether on the National Register or not), information on any previous surveys performed and an evaluation of their quality, a recommendation as to the need for a survey of historic and cultural properties, and recommendations as to the type of survey and/or survey methods should a survey be recommended, and recommendations on boundaries of such surveys.

(2) The Agency Official shall, after due consideration of the information obtained pursuant to § 800.4(a)(1), determine what further actions are necessary to discharge the agency's affirmative responsibilities to locate and identify eligible properties that are within the area of the undertaking's potential environmental impact and that may be affected by the undertaking. Such actions may include a professional cultural resource survey of the environmental impact area, or parts of the

area, if the area has not previously been adequately surveyed. The recommendations of the State Historic Preservation Officer should be followed in this matter.

(3) The Agency Official, in consultation with the State Historic Preservation Officer, shall apply the National Register criteria to all properties that may possess any historical, architectural, archeological, or cultural value located within the area of the undertaking's potential environmental impact. If either the Agency Official or the State Historic Preservation Officer finds that a property meets the National Register Criteria or a question exists as to whether a property meets the Criteria, the Agency Official shall request a determination of eligibility from the Secretary of the Interior in accordance with 36CFR Part 63. The opinion of the Secretary respecting the eligibility of a property shall be conclusive for the purposes of these regulations. If the Agency Official and the State Historic Preservation Officer agree that no identified property meets the Criteria, the Agency Official shall document this finding and, unless the Secretary has otherwise made a determination of eligibility under 36 CFR Part 63, may proceed with the undertaking.

(4) The Agency Official shall complete the preceding steps prior to requesting the Council's comments pursuant to § 800.4 (b)-(d). The Agency Official may, however, initiate a request for the Council's comments simultaneously with a request for a determination of eligibility from the Secretary when the Agency Official and the State Historic Preservation Officer agree that a property meets the National Register Criteria. Before the Council completes action pursuant to § 800.6 the Secretary must find the property eligible for inclusion in the National Register.

(b) *Determination of Effect.* For each National Register or eligible property that is located within the area of the undertaking's potential environmental impact, the Agency Official, in consultation with the State Historic Preservation Officer, shall apply the Criteria of Effect, (§ 800.3(a)), to determine whether

the undertaking will have an effect upon the historical, architectural, archeological, or cultural characteristics of the property that qualified it to meet National Register Criteria.

(1) *No Effect.* If the Agency Official, in consultation with the State Historic Preservation Officer, finds that the undertaking will not affect these characteristics, the undertaking may proceed. The Agency Official shall document each Determination of No Effect, which shall be available for public inspection. If the State Historic Preservation Officer objects or other timely objection is made to the Executive Director to an Agency Official's Determination of No Effect, the Executive Director may review the Determination and advise the Agency Official, the State Historic Preservation Officer and any objecting party of the findings within 15 days.

(2) *Effect determined.* If the Agency Official or the Executive Director finds that the undertaking will have an effect upon these characteristics, the Agency Official, in consultation with the State Historic Preservation Officer, shall apply the Criteria of Adverse Effect, set forth in §800.3(b), to determine whether the effect of the undertaking may be adverse.

(c) *Determinations of no adverse effect.* If the Agency Official, in consultation with the State Historic Preservation Officer, finds the effect on the historical, architectural, archeological, or cultural characteristics of the property not to be adverse, the Agency Official shall forward adequate documentation (See § 800.13(a)) of the Determination, including written evidence of the views of the State Historic Preservation Officer, to the Executive Director for review in accordance with §800.6. If the State Historic Preservation Officer fails to respond to an Agency Official's request as provided in §800.5, the Agency Official shall include evidence of having contacted the State Historic Preservation Officer.

(d) *Adverse effect determination.* If the Agency Official finds the effect on the historical, architectural, archeological, or cultural characteristics of the property to be adverse, or if the

Executive Director does not accept an Agency Official's Determination of No Adverse Effect pursuant to review under §800.6, the Agency Official shall:

(1) Prepare and submit a Preliminary Case Report requesting the comments of the Council (See §800.13(b)),

(2) Notify the State Historic Preservation Officer of this request, and

(3) Proceed with the consultation process set forth in §800.6.

(e) *Suspense of action.* Until the Council issues its comment under these regulations, good faith consultation shall precede a Federal agency from taking or sanctioning any action or making any irreversible or irretrievable commitment that could result in an adverse effect on a National Register or eligible property or that would foreclose the consideration of modifications or alternatives to the proposed undertaking that could avoid, mitigate, or minimize such adverse effects.

§800.5 State Historic Preservation Officer responsibilities.

(a) The State Historic Preservation Officer should participate in the review process established by these regulations whenever it concerns an undertaking located within the State Historic Preservation Officer's jurisdiction.

§800.6 Council comments.

The following subsections specify how the Council will respond to Federal agency requests for the Council's comments required to satisfy an agency's responsibilities under Section 106 of the Act and Section 2(b) of the Executive Order.

(a) *Response to determinations of no adverse effect.* (1) Upon receipt of a Determination of No Adverse Effect from an Agency Official, the Executive Director will review the Determination and supporting documentation. Normally, the Executive Director will concur without delay. If the documentation is not adequate, the Executive Director will so inform the Agency Official within 15 days. Unless the Executive Director objects

to the Determination within 30 days after receipt of an adequately documented Determination, the Agency Official will be considered to have satisfied the agency's responsibilities under Section 106 of the Act, Section 2(b) of the Executive Order. and these regulations, and may proceed with the undertaking.

(2) If the Executive Director objects to a Determination of No Adverse Effect, the Executive Director shall specify the basis for the objection and may specify conditions which will eliminate the objection. As appropriate, the Executive Director may consult the Agency Official, the State Historic Preservation Officer, and other interested parties in specifying conditions. If the Agency Official accepts the conditions in writing, the conditions will be incorporated into the agency's Determination and the Executive Director's objection will be withdrawn. The Agency Official then will be considered to have satisfied the agency's responsibilities under Section 106 of the Act, Section 2(b) of the Executive Order, and these regulations, and may proceed with the undertaking.

(3) If the Agency Official does not accept the Executive Director's conditions or if the Executive Director objects to a Determination of No Adverse Effect without specifying conditions that would remove the objection, the Executive Director shall initiate the consultation process pursuant to § 800.6(b).

(b) *Consultation Process.* The Agency Official, the State Historic Preservation Officer, and the Executive Director shall be the consulting parties to consider feasible and prudent alternatives to the undertaking that could avoid, mitigate, or minimize adverse effects on a National Register or eligible property. When an undertaking involves more than one Federal agency, these agencies may, upon notification to the Executive Director, coordinate their consultation responsibilities through a single lead agency. Grantees, permittees, licensees, or other parties in interest, and representatives of national, State, or local units of government and public and private organizations, may be invited by the consulting parties to participate in the consultation process.

(1) *Preliminary Case Report.* The Agency Official shall provide copies of the report to the consulting parties at the initiation of the consultation and make it readily available for public inspection.

(2) *On-site inspection.* At the request of any of the consulting parties, the Agency Official shall conduct an on-site inspection.

(3) *Public Information Meeting.* At the request of any of the consulting parties, the Executive Director shall conduct a meeting open to the public, where representatives of national, State, or local units of government, representatives of public or private organizations, and interested citizens may receive information and express their views on the undertaking, its effects on the National Register or eligible property, and alternate courses of action that could avoid, mitigate, or minimize any adverse effects on such properties. The Agency Official shall provide adequate facilities for the meeting near the site of the undertaking and shall afford appropriate notice to the public, generally at least 15 days in advance of the meeting.

(4) *Consideration of Alternatives.* Upon review of the proposed undertaking and after any on-site inspection or public information meeting, the consulting parties shall determine whether there are feasible and prudent alternatives to avoid the adverse effects on National Register or eligible property. If the consulting parties cannot agree on an alternative to avoid, they shall consult further to determine if there are alternatives that could satisfactorily mitigate the adverse efect.

(5) *Avoidance or Satisfactory Mitigation of Adverse Effect.* If the consulting parties agree upon a feasible and prudent alternative to avoid or satisfactorily mitigate the adverse effects of the undertaking on the National Register or eligible property, they shall execute a Memorandum of Agreement in accordance with §800.6(c) specifying how the undertaking will proceed to avoid or mitigate the adverse effect.

(6) *Acceptance of Adverse Effect.* If the consulting parties determine that there are no feasible and prudent alternatives

that could avoid or satisfactorily mitigate the adverse effects and agree that it is in the public interest to proceed with the proposed undertaking, they shall execute a Memorandum of Agreement in accordance with §800.6(c) acknowledging this determination and specifying any recording, salvage, or other measures to minimize the adverse effects that shall be taken before the undertaking proceeds.

(7) *Failure to Agree.* Upon the failure of the consulting parties to agree upon the terms for a Memorandum of Agreement, or upon notice of such failure by any of the consulting parties to the Executive Director, the Executive Director shall notify the Chairman within fifteen days and shall recommend whether or not the matter should be scheduled for consideration at a Council meeting. The Agency Official and the State Historic Preservation Officer shall be notified in writing of the Executive Director's recommendation.

(c) *Memorandum of Agreement*—(1) *Preparation of Memorandum of Agreement.* It shall be the responsibility of the Executive Director to prepare each Memorandum of Agreement required under these regulations. Unless otherwise requested by the Executive Director, the Agency Official shall prepare a proposal for inclusion in the Agreement that details the actions agreed upon by the consulting parties to be taken to avoid, satisfactorily mitigate, or accept the adverse effects on the property. The State Historic Preservation Officer's written concurrence shall be included in this proposal by the Agency Official. If the Executive Director determines that the proposal represents the agreement of the consulting parties, he shall within 10 days forward it as a Memorandum of Agreement to the Chairman for ratification pursuant to §800.6(c)(2). If the Executive Director determines that the proposal does not adequately represent the agreement reached by the consulting parties, it may be returned to the Agency Official, or a Memorandum of Agreement revising the proposal may be submitted to the Agency Official and the State Historic Preservation Officer. As

appropriate other parties in interest may be invited by the consulting parties to indicate their concurrence with the proposal or to be a signatory to the Agreement.

(2) *Review of Memorandum of Agreement.* Upon receipt of an executed Memorandum of Agreement, the Chairman shall institute a 30-day review period. Unless the Chairman notifies the Agency Official that the matter has been placed on the agenda for consideration at a Council meeting, the Agreement shall become final when ratified by the Chairman or upon the expiration of the 30-day review period with no action taken. Copies will be provided to signatories and notice of executed Memoranda of Agreement shall be published in the Federal Register. The Memorandum of Agreement should be included in the final environmental impact statement prepared pursuant to the National Environmental Policy Act.

(3) *Effect of Memorandum of Agreement.* Agreements duly executed shall constitute the comments of the Council and shall evidence satisfaction of the Federal agency's responsibilities for the proposed undertaking under Section 106 of the Act, Section 2(b) of the Executive Order, and these regulations. Failure to carry out the terms of a Memorandum of Agreement requires that the Federal agency again request the Council's comments in accordance with these regulations. In such instances, until the Council issues its comments under these regulations the Agency Official shall not take or sanction any action or make any irreversible or irretrievable commitment that could result in an adverse effect with respect to the National Register or eligible properties covered by the Agreement or that would foreclose the Council's consideration of modifications or alternatives to the proposed undertaking that could avoid or mitigate the adverse effect.

(4) *Amendment of a Memorandum of Agreement.* If a signatory determines that the terms of the Memorandum of Agreement cannot be met or believes a change is necessary, the signatory shall immediately request the consulting parties to consider an amendment of the Agreement. Amendments will be executed in the same manner as the original Agreement.

§800.9 Coordination with agency requirements under the National Environmental Policy Act (42 U.S.C. 4321 et seq.).

Section 101(b)(4) of the National Environmental Policy Act (NEPA) declares that one objective of national environmental policy is to "preserve important historic, cultural, and natural aspects of our national heritage and maintain, wherever possible, an environment which supports diversity and variety of individual choice." In order to meet this objective, Federal agencies should coordinate NEPA compliance with the separate responsibilities of the National Historic Preservation Act and Executive Order 11593 to ensure that historic and cultural properties are given proper consideration in the prepartion of environmental assessments and environmental impact statements. Agency obligations pursuant to the National Historic Preservation Act and Executive Order 11593 are independent from NEPA requirements and must be complied with even when an environmental impact statement is not required. Agencies should also be aware that the threshold for compliance with Section 106 and the Executive Order is less than that for preparation of an environmental impact statement. The former applies to any Federal, federally assisted or federally licensed undertaking having an effect on a National Register or eligible property, while the latter extends only to major Federal actions significantly affecting the human environment. Where both NEPA and the Act or Executive Order are applicable, the Council on Environmental Quality, in its National Environmental Policy Act—Regulations (40 CFR 1502.25), directs that draft environmental impact statements prepared under Section 102(2)(C) of NEPA shall, to the fullest extent possible, be prepared with and integrated with other environmental impact analyses and related surveys and studies required by other authorities—such as the National Historic Preservation Act and Executive Order 11593. Preparation of a draft environmental impact statement may fulfill the requirements for reports and documentation under these authorities.

Circulation of the statement for comment pursuant to Section 102(2)(C) of NEPA shall constitute a request for Council comments under § 800.4 of these regulations if Federal agencies so request in cover letters circulated with draft environmental impact statements. To coordinate the independent responsibilities of the Act and NEPA, Federal agencies should undertake compliance with these regulations whenever National Register or eligible properties may be affected by an undertaking.

SAMPLING OF PERTINENT EXCERPTS OF TYPICAL NEPA GUIDELINES FROM FEDERAL AGENCIES

1. Department of the Army-Environmental Protection and Enhancement, NEPA Guidelines 32 C.F.R. § 650 et seq. (1979)

   32 C.F.R. § 650.192-Archaeological Sites

   "(b) . . . Since Army activities may necessarily lead to the destruction of an archaeological site, the survey must include value judgments assessing the relevant significance of the sites so that the destruction of more significant surveyed sites may be avoided."

   "(c) The National Park Service may not be able to provide timely surveys of archaeological resources necessary for the prepartion of legally sufficient environmental statements . . . In these cases the installation commander is authorized to contract with outside experts for the survey of archaeological sites . . . ."

2. U.S. Department of Agriculture-Agriculture Stabilization and Conservation Service, NEPA Guidelines 7 C.F.R. § 799 et seq. (1980)

   7 C.F.R. § 799.5(b)2 (1980)

   "Applicants or consultants on certain type projects may be requested to furnish analyses and information in connection with the project. This material may be used in the preparation of the EIS."

   7 C.F.R. § 799.6(d)(2)

   "It is an objective of the USDA to involve the public in developing its policies and in formulating and implementing its programs. To assist in accomplishing these objectives, the agency will utilize timely and effective procedures such as public meetings, new media . . . ."

3. U.S. Department of Agriculture-Office of Environmental Quality, NEPA Guidelines 7 C.F.R. § 3100 et seq. (1980)

7 C.F.R. §3100.26

The OEQ will work with USDA agencies to identify sources of technical and editorial expertise necessary to supply interdisciplinary needs which have been identified in the scoping process and for which expertise is not available within that particular agency.

7 C.F.R. §3100.41

The following acts are under OEQ jurisdiction:

Antiquities Act of 1906-16 U.S.C. 431 et seq.
Historical Sites Act of 1935-16 U.S.C. 461 et seq.
Reservoir Salvage Act of 1960-16 U.S.C. 469-69(c)
National Historic Preservation Act of 1966-16 U.S.C. 470
NEPA 42 U.S.C. 4321 et seq.
Historical and Agricultural Data Preservation Act of 1974 Public Law 93-291
Public Buildings Cooperative Use Act of 1976-40 U.S.C. 611
American Indians Religious Freedom Act of 1978-42 U.S.C. 1996

7 C.F.R. §3100.45(b)

"Each agency of the Department which conducts programs or activities that may have an effect on the cultural environment shall recruit, . . . or otherwise have available professional expertise in anthropology, archaeology, historical architecture, and/or cultural resource management (depending upon specific need)."

7 C.F.R. §3100.46

"Responsibility for the protection of the cultural environment belongs to OEQ:

(c) In order to carry out cultural resource responsibilities, there will be professional expertise within the OEQ to advise agencies, aid the Department, . . . and to insure that all . . . comply."

4. CAB-Implementation of NEPA 14 C.F.R. § 312 (1980)

   14 C.F.R. § 312.14(c)

   "In some cases draft environmental impact statements may be prepared by private consultants. *In all cases*, the Board will make its *own evaulation* of the environmental issues and *take responsibility for the scope and content of draft* and *final environmental impact statements.*" (Emphasis added.)

5. FCC-Implementation of NEPA 47 C.F.R. § 1.1301 et seq. (1979)

   47 C.F.R. § 1.1313(b)2

   "If it is determined that a grant will or may have a significant environmental effect, the staff may, before deciding to prepare the draft environmental impact statement, discuss matters of environmental concern with the applicant, concerned individuals and experts, in an effort to identify measures which could be taken to minimize adverse effect and alternatives which are not, or are less, objectionable."

6. Federal Highway Administration-NEPA Guidelines 23 C.F.R. § 771 (1980)

   23 C.F.R. § 771.7(a)

   "Consultants may be utilized in preparing all types of environmental studies and reports. The responsibility for formulating all conclusions and determinations involved in the environmental decisions *shall remain with the HA* and *FHWA.*" (Emphasis Added.)

APPENDIX D

DESCRIPTION OF NHPA COMMENT AND REVIEW PROCESS

The central implementing regulations governing the preservation and protection of historical and archaeological resources potentially impacted by a federal undertaking such as the Corps' granting of a permit to FCWA to construct its intake facility are contained in 36 C.F.R. 800. It consists of fifteen sections and is entitled, "Protection of Historic and Cultural Properties". These regulations delineate procedures for compliance with the mandates of NHPA, EO 11593 and NEPA.

Ultimate responsibility for administering these regulations resides with the Advisory Council on Historic Preservation, ("The Advisory Council") and its Executive Director ("the Executive Director"). (16 U.S.C. §470i and 470j; 36 C.F.R. § § 800.1 and 800.6) The Advisory Council and its Executive Director share their authority with heads of federal agencies required to apply these regulations, with State Historic Preservation Officers ("SHPO"), and others. (36 C.F.R. §800 *et seq.*) The process, which culminates in a Memorandum Agreement between the Executive Director, SHPO, agency head (and sometimes others), (36 C.F.R. §800.6); requires that federal agencies identify properties within an environmental impact area either listed on the National Register of Historic Places ("the National Register") (36 C.F.S. §800.2(d)) or eligible for nomination to it ("eligible property") (36 C.F.R. §800.2(f)); evaluate the significance of any historic or cultural resources located within these properties and determine any adverse effects upon these resources. (36 C.F.R. §800.4)

The Memorandum Agreement binds the federal agency and others to incorporate a plan to avoid, mitigate or minimize effects of the contemplated undertaking upon endangered historical and cultural resources. (36 C.F.R. §800.6(c)(3))

Executive Order 11593 (May 13, 1971, 36 Fed Reg. 8921) augments these regulations. It places an affirmative obligation

upon the federal government to "provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation." (Section 1) It delegates to the Secretary of Interior and each SHPO responsibility for identifying properties eligible for nomination to the National Register and to make such nominations. The Secretary of Interior has promulgated regulations to implement that authority (36 C.F.R. Part 63)

Section 2 of the Executive Order directs all federal agencies to assist in the effort to identify eligible properties, directs federal agencies to refer questionable actions to the Secretary of Interior for an opinion respecting the property's eligiblity for inclusion on the National Register; provides that once the Secretary of Interior determines such eligibility, that the agency head reconsider its contemplated undertaking and take into account national environmental and preservation policy; and proscribes any further action by the agency head until the Advisory Council and SHPO have an opportunity to review and comment on the proposal. The NHPA Regulations dovetail with the Executive Order by delineating the process for such review and comment.

The procedures contained in these regulations require that where appropriate, federal agencies submit information for review and comment to the Advisory Council whenever one of their activities may affect a National Register or eligible property. (36 C.F.R. § 800.4)

The preamble to § 800.4 states that as early as possible in the planning of a federal undertaking, the responsible agency must "identify or cause to be identified any National Register and eligible property that is located within the area of the undertaking's potential environmental impact and that may be affected by the undertaking." In this regard, § 800.4(1) places an affirmative obligation upon the agency official charged with the undertaking to consult with SHPO about the existence of any such properties and authorizes the SHPO to provide "a recommendation as to the need for a survey of historic and cultural

properties, and recommendations as to the type of survey and/or survey methods should a survey be recommended . . . ."

Once an Agency official receives such a recommendation, § 800.4(2) requires that he "determine what further actions are necessary to discharge the agency's affirmative responsibilities to locate and identify eligible properties that are within the area of the undertaking's environmental impact and that may be affected . . . . Such actions *may include a professional cultural resources survey of the environmental impact area* . . . the recommendations of the SHPO should be followed in this matter." (Emphasis added.)

Upon completion of a survey and background research which serve to locate properties not on the Register but which are eligible for it, the agency head, in consultation with the SHPO, must apply "National Register Criteria" enumerated in § 800.10 and determine whether such property meets one or more of these criteria. (36 C.F.R. § 400.4(a)(3)).

If a property within the environmental impact area meets one or more of the National Register Criteria, (36 C.F.R. § 60.6) the agency head must then apply "Criteria of Effect and Criteria of Adverse Effect". (36 C.F.R. § § 800.3(b), 800.4(b) and 4(d)).

A finding by the agency head "in consultation with SHPO" that the undertaking will "not affect" the historical or archaeological resources identified earlier in the process aborts the review process and permits the undertaking to proceed. (36 C.F.R. § 800.4(b)(1). The Agency official must document the finding and make it available for public inspection. (36 C.F.R. § 800.4(b)(1)). If the SHPO objects or "other timely objection is made" to the Executive Director of such a finding, and the Executive Director disagrees with the conclusion of "no effect", then the Agency official in consultation with the SHPO must apply the Criteria of Adverse Effect to the undertaking. (36 C.F.R. § § 800.4(b)(1) and 800.4(c))

A finding of "adverse effect" upon the historical or archaeological resources in question either by the agency head (in consultation with the SHPO) or the Executive Director (in exercise

of his reviewing authority), requires that the Agency official prepare a "preliminary Case Report" requesting the comments of the Council, notify the SHPO of such action, and engage in a "consultation process." (36 C.F.R. § 800.4(d) and § 800.6(b)).

During this consultation and review phase, the regulations provide that "good faith consultations shall preclude a federal agency from taking or sanctioning any action or making any irreversible or irretrievable *commitment that could result in an adverse effect* on a National Register or eligible property or that would foreclose the consideration of modifications or alternatives to the proposed undertaking that could avoid, mitigate, or minimize such adverse effects." (36 C.F.R. (§ 800.4(e)) (Emphasis added.) Read together with § 2 of EO 11593, (36 Fed. Reg. 8921) NHPA regulations require that the proposed undertaking must stop altogether until completion of the comment and review process.

§ 800.6 establishes a formal consultation process to assure widespread participation and involvement of all interested parties (including the public) in the overall review and decision making process. § 800.6(b) designates the agency head, the SHPO and the Executive Director as "the consulting parties to consider feasible and prudent alternatives to the undertaking that could avoid, mitigate, or minimize adverse effects on a National Register or eligible properties." This section allows for interagency coordination when more than one agency is involved in the undertaking and *authorizes participation as consulting parties by grantees, licensees* or *"other parties in interest"*, and representatives of National, State or *local units of government* and public or private organizations. (36 C.F.R. § § 800.6(b)) (Emphasis added)

The "Preliminary Case Report" mandated by § 800.6(b)(1) then becomes a focal point for the review process and must be made "readily available for public inspection."At the request of any consulting parties, the agency head must conduct an on-site inspection. The Executive Director must conduct a meeting "open to the public", preceded by public notices and located

near the site (36 C.F.R. §§800.6(b)(2)(3)). Representatives of national, State, or local units of government, representatives of public or private organizations, and interested citizens may receive information and express their views on the undertaking, its effects on the National Register or eligible property, and alternative courses of action that could avoid, mitigate, or minimize any adverse effects on such properties. (36 C.F.R. §§800.6(b)(2)(3)).

If the consulting parties agree upon "a feasible and prudent alternative to avoid or satisfactorily mitigate the adverse effects of the undertaking on the National Register or eligible property," §800.6(b)(5) directs that "they shall execute a Memorandum of Agreement . . . specifying how the undertaking will proceed to avoid or mitigate the adverse effect."

Ultimate responsibility for preparation of the Memorandum Agreement rests with the Executive Director. (36 C.F.R. §800.6(c)(1)). Ordinarily the agency head must prepare a proposal for inclusion in the agreement that "details the actions to be taken to avoid, satisfactorily mitigate, or accept the adverse effects on the property". (36 C.F.R. §800.6(c)(1)). Where appropriate, other consulting parties' concurrence to the agreement or participation in it may be sought. (36 C.F.R. §800.6(c)(1)).

§800.6(c)(1) and (2) address the legal significance of the Memorandum of Agreement. §800.6(c)(1) states that the Memorandum of Agreement should be included in the final environmental impact statement required by NEPA. §800.6(c)(2) provides in pertinent part that:

> Agreements . . . shall constitute the comments of the Council and shall evidence satisfaction of the Federal Agency's responsibilities for the proposed undertaking . . . Failure to carry out the terms of the Memorandum Agreement requires that the Federal Agency again request the Council's comments . . . . In such instances, until the Council issues its comments . . . the Agency shall not take or sanction any action . . . that could result in an adverse effect with respect to . . . properties covered by the Agreement . . . . (36 C.F.R. §800.6(c)(2)).

Like the NHPA, NEPA also requires federal agencies to consider adverse effects of a federal undertaking on historical and cultural resources located within an environmental impact area. 40 C.F.R. Part 1500 contains regulations governing the environmental impact statement under NEPA. It places primary responsibility for review in the Environmental Protection Agency ("EPA") and ultimate responsibility in the Council on Environmental Quality. § 800.9 interlocks the comment and review process under NHPA with the environmental impact statement process under NEPA.

Finally the Corps of Engineers has promulgated regulations implementing NHPA. (Corps of Engineers, NHPA Guidelines, 33 C.F.R. Part 305)

APPENDIX E

THE CULTURAL RESOURCES OF LOWES ISLAND VIRGINIA

BY

PREPARED FOR

Fairfax County Water Authority

This volume reports the results and evaluation of a literature search and an intensive field survey to identify and describe the archaeological, historical and architectural cultural resources of Lowes Island, Virginia. This report reflects the views of Iroquois Research Institute and does not purport to represent the official views nor policies of the Fairfax County Water Authority.

MAY 1978

Library of Congress
78-53958

EXECUTIVE SUMMARY

This report describes the archaeological, architectural, and historic resources at Lowes Island which is located along the Potomac River in Loudoun County, Virginia, about a half mile west of the Fairfax County line. The Fairfax County Water Authority commissioned Iroquois Research Institute to pre- re this report as part of the Authority's compliance procedures in seeking a Federal permit from the U.S. Army Corps of Engineers, Baltimore District, for construction of water intake facilities. This operation is intended to augment the supply of water in Fairfax County.

The Potomac River is an interstate, navigable waterway under the protection of the Corps of Engineers. This agency is responsible for safeguarding any historic and prehistoric resources that may be adversely affected by the proposed construction, maintenance, and operation of facilities authorized by a permit issues by the Corps. Federal regulations require full public disclosure of the quantity and quality of cultural resources to be affected by a permit and of any management plan designed to protect resources that are valuable in terms of understanding the heritage of the United States.

The first phase of Iroquois' investigation was an inventory of all cultural resources in the study area. This was followed by a careful analysis intended to assess the impact upon these resources by any of the alternative plans for the placement and construction of the water intake facilities.

Iroquois has determined that there are abundant and significant cultural resources in the study area. Any of the proposed alternatives will adversely affect some of the cultural resources. Mitigation is required on Lowes Island to prevent an irretrievable or irreplaceable loss of scientific data unique for interpreting the history of the region. Iroquois feels that an affirmative permit action with appropriate stipulations for adaquate mitigation of these adverse effects on resources which are potentially eligible for nomination fot the National Register of Historic Places. [sic].

The study area's historic resources are significant and eligible for nomination to the National Register of Historic Places under as many as three criteria. The archaeological resources equally qualify under at least one criterion. The historic resources have local and national significance, while the archaeological resources are locally and regionally significant. No significant architectural resources in the study area were identified.

A carefully detailed management plan for adequate mitigation of adverse effects would comply with the National Historic Preservation Act, *et al.* If an adequate management plan is adopted which allows the interference-free mitigation prior to construction, there would be no grounds for denial of the permit.

As the time period available for mitigation increases, the costs of management options open to the Authority decreases.

Iroquois Research Institute
31 May 1978

* * *

SCOPE OF THE PRESENT STUDY

The intent of this study is to comply with existing legislation which protects America's cultural heritage. A further objective is to inform concerned institutions of potential impacts upon cultural resources due to proposed construction requiring a Federal permit from the U.S. Army Corps of Engineers, Baltimore District. The legislation guiding this study is the National Environmental Policy Act of 1969 (P.O. 91-190), Protection and Enhancement of the Cultural Environment (E.O. 11593), Advisory Council's Procedures for the Protection of Historic and Cultural Properties (36 C.F.R. 800), and National Historic Preservation Act of 1966 (P.O. 89-665). This is also designed to meet the normal data requirements of the Offices of the Maryland and the Virginia State Historic Preservation Officers.

The goal of the study is to identify the actual or potential significance of cultural resources and to present management

options for minimizing the impact upon cultural resources which may be eligible for the National Register of Historic Places. The significance and potential eligibility of these cultural resources are determined within the context of the present knowledge concerning the history architecture and prehistory of the lower Potomac River Basin.

Iroquois Research Institute addresses mitigation options and their technical, cultural, and financial implications. It is anticipated that the facts presented in this study will be useful in the federal permit action concerning the proposed facilities.

CHAPTER FIVE

Management Recommendations

ELIGIBILITY AND SIGNIFICANCE CRITERIA

The significance of the historical and archaeological resources of Lowes Island is based on the following criteria established by the Advisory Council on Historic Preservation:

National Register criteria for evaluation. The quality of significance in American history, architecture, archaeology, and culture is present in districts, sites, buildings, structures, and objects of State and local importance that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and

(a) That are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) That are associated with the lives of persons significant in our past; or

(c) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) That have yielded, or may be likely to yield, information important in prehistory or history.

The significance of the historic resources and the potential eligibility of these historic resources are based on (b) and to a lesser degree on (d) of the criteria above.

Lowes Island was settled by Euro-Americans in the early 18th century. The development and use of the Sugarlands was typical of the pattern of increasing land-use that characterized the 1700's. George Washington attempted to obtain ownership of part of the Sugarlands. During the Civil War, Colonel John S. Mosby used the area during the Monocacy Campaign whose battlefield is a national monument; and Confederate Generals J.E.B. Stuart, Wade Hampton, and Fitzhugh Lee used the area

for a key tactical maneuver during the Gettysburg Campaign whose battlefield is a national monument.

* * *

MITIGATION

The concentration of cultural resources implies that some mitigation of adverse impact upon the cultural resources must be completed prior to the authorization of construction. Given the distribution of cultural resources, adverse impact upon these resources cannot be avoided. The proposed and preferred alignments for which a permit has been requested consist of Intake Site D, Conduit Alternate I, Pump Station D, the access road and the outlet pipe. They will definitely impact four known, registered sites: LD3, LD47, LD49, and LD50 and three possible sites: McDaniel's scatters C, D, and G. Six additional archaeological sites: LD43, LD44, LD45, LD46, LD48, and LD51 are close enough to this preferred alignment that their sub-surface boundaries may be impacted by the construction.

The compilation of background data gives the location of sites and artifacts discovered on the surface and in the plow zone by Iroquois and by others. Test excavations indicate that sites discovered by surface means occur to a minimum depth of 0.8 meters on the first terrace and a depth of 1.5 meters along the river bank (McDaniel, personal communication).

Additional presently undiscovered sites may be deeply buried in the flood plain sediments. The number and extent of the buried sites cannot be determined on the basis of presently available information. The following recommended mitigation program addresses the problem of surface and buried sites.

The continued safeguarding of the resource base in the impacted area (see Appendix E, Official Correspondence) should be authorized. Normally Phase II testings, when accompanied by a mitigation plan, would be consistent with an affirmative, provisional permit decision. The Island has attracted artifact collectors who pick up artifacts from the surface, particularly along the river bank. In spite of this, the densest concentrations

of artifactual material are located along the river bank. It is possible that the sub-surface remains are more numerous than the controlled surface collections indicate.

A phased mitigation plan must initially consider the depth of deposits. In a food plain context, deep testing should normally be performed in the area of licensed construction. It is a real possibility that ancient sites have been deeply buried by the accumulation of silts over thousands of years of river action. This is most likely to have occurred at the western end of the Island due to the depositional factors discussed in Chapter II. This supposition is supported by R.E. McDaniel's discovery of a Paleo-Indian site on the fourth terrace. River sediments dating back to the Paleo-Indian period are located in the upper strata away from the river. Approaching the river sediments become deeper; more recent deposits are located closer to the surface and nearer to the river. The absence of artifact scatters on the surface does not imply the absence of deeply buried sites. Such sites probably exist without surface indicators. . . . .

APPENDIX F

1.0 INTRODUCTION

The Washington Suburban Sanitary Commission (WSSC), and the Fairfax County Water Authority (FCWA) have independently developed plans for new water intake structures on the Potomac River above Washington, D.C. These structures are to be used to supply additional potable water to their respective service areas in the Washington Metropolitan Area (WMA) (Sultan, 1977; Corbalis, 1977).

The WSSC has requested two permits from the U.S. Army, Corps of Engineers, Baltimore District Office. The first permit is for construction of a diversion weir across the north channel of the Potomac River at Watkins Island. The purpose of the weir is to maintain a constant pool at the existing WSSC intake and to eliminate operational problems that exist during periods of low flow (Public Notice 188, Appendix A). The second permit involves replacement of the existing intake structure with a new intake of greater capacity to accommodate planned expansion of capacity in the WSSC Potomac River Water Treatment Plant (Public Notice 487, Appendix A).

The FCWA has one permit request pending before the Corps of Engineers (Public Notice 665, Appendix A). This permit is for the construction of an intake facility for public water supply at Lowes Island, Loudoun County, Virginia. At present there are no facilities at that site.

In addition, the Corps of Engineers has negotiated with the State of Maryland, the Commonwealth of Virginia, the District of Columbia, WSSC, and FCWA the terms of a Low Flow Allocation Agreement (LFAA). This agreement allocates the waters of the Potomac River during periods of low flow, to the various suppliers on a fair and equitable basis.

The Corps of Engineers is responsible for assessing the environmental impacts of a pending permit application for work involving navigable waters before deciding to approve or deny any permit application. This responsibility is derived from various authorities, including:

- The River and Harbor Act of 1899
- The National Environmental Police Act of 1969 (NEPA)
- The Federal Water Pollution Control Act Amendments of 1972 (Section 404)
- The National Historic Preservation Act of 1966

* * *

While all four actions (the three permit applications and the LFAA) are basically independent of each other, much of the material necessary for evaluation is common to all. Because of this, the Corps has chosen to prepare one overall Environmental Impact Statement which addresses all four actions.

* * *

7.2.5 *Archaeological and Historical Resources*

The major historical site in the area is the Chesapeake and Ohio Canal National Historical Park on the Maryland side of the river, approximately 2,000 feet from the site of the proposed intake. Although noise levels produced by construction activities may be noticeable along the canal, these levels will not be intrusive and will not significantly alter the setting of this historic site.

As previously described (Section 4.3.2.1), a recent reconnaissance of the project site uncovered artifacts in an undisturbed stratified context at the location of the proposed intake and in adjacent areas. This reconnaissance covered only the immediate area of the intake and it is expected that similar discoveries would be made along the route of the raw water conduit and very probably on the site of the raw water pumping station (McDaniel, 1977). An intensive archaeological and cultural resources study has been initiated by the FCWA in order to avoid accidental destruction of such resources due to construction activities. The results of this study are not yet available, but will be integrated into the planning of the construction activity.

* * *

14.3 *Alternatives to the Proposed FCWA Intake*

The FCWA selected four preliminary sites for the intake based on engineering, environmental, and economic factors. The criteria used were: channel flow, water depth, river bank stability and slope, water quality and economics. The four sites that were investigated are shown in Figure 14-2, and the site characteristics as well as the estimated costs are shown in Table 14-1. The locations available for evaluation were limited to areas behind an existing dam in order to insure adequate depth.

DEPARTMENT OF THE ARMY

PERMIT

NABOP-F/4(Fairfax County Water Authority)76-1126

U.S. Army Engineer District, Baltimore
Corps of Engineers
P.O. Box 1715, Baltimore, Md. 21203

Referring to written request dated 20 September 1976 for a permit to:

(XX) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the River and Harbor Act of 3 March 1899, 33 U.S.C. 403;

(XX) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act (86 Stat. 816, P.L. 92-500);

( ) Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (86 Stat. 1052; P.L. 92-532);

APPENDIX G

55a

Fairfax County Water Authority
4121 Chatelin Road
P. O. Box 91
Annandale, Virginia 22003

is hereby authorized by the Secretary of the Army to install an intake consisting of a reinforce concrete structure with a trash boom, bar rack and air header extending no more tha 63 feet channelward of the average high water line; to dredge approximately 1,700 cubic yards of granular material and deposit the material upland; to place approximately 400 cubic yards of clean backfill and 390 cubic yards of concrete at the average high water line.

in the Potomac River

XXX UPSTREAM from Dam #2, Loudoun County, Maryland

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit

TITLED: "PROPOSED RAW WATER INTAKE ON POTOMAC RIVER PURPOSE: WATER SUPPLY INTAKE DATUM: MEAN SEA LEVEL - (USGS) NEAR DRANESVILLE COUNTY OF LOUDOUN STATE VA. APPLICATION BY FAIRFAX COUNTY WATER AUTHORITY SHEET 1 OF 3 DATE 9/16/76"

(w) Construction of the intake, gravity flow pipeline or pumping station will not commence until the District Engineer, in consultation with the State Historic Preservation Officer and the Advisory Council for Historic Preservation, determines that all appropriate actions necessary to identify and recover archeological resources which might be affected have been completed.

56a

By Authority of the Secretary of the Army

G. K. WITHERS
Colonel, Corps of Engineers
District Engineer

JUL 21 1978
Date

Permittee hereby accepts the terms and conditions of this permit.

Permittee

7/21/78
Date

The permittee anticipated the construction of the work will begin on 1 NOVEMBER 1978 and be completed by 31 DECEMBER 1981 .

No. 80-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUDOUN TIMES-MIRROR, et al.,
Petitioners,

v.

ARCTIC COMPANY, LTD., t/a
IROQUOIS RESEARCH INSTITUTE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 24, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

1. Where the Petitioners failed to challenge the opinion of the District Court in the court below, and acquiesced in the decision of the District Court which found that Respondent was not a "public figure," can the Petitioners, now for the first time, raise this as an issue to be considered by this Court?

2. Does an independent privately owned company not generally known in the community which is engaged in historical and archeological research, and which is employed by a Water Authority for a short period of time to perform a specific study but without any authority to participate in policy determinations, recommendations, and exercising no discretion, no judgment, or decision-making authority become a "public official" for libel litigation purposes?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Arctic Company, Ltd., T/A Iroquois Research Institute, Appellant

Loudoun Times-Mirror, Appellee

Kyle Parks, Appellee

R. E. McDaniel, Appellee

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The Court Below Correctly Found That Respondent Was Not A "Public Figure" Or A "Public Official" And That Respondent Was A Private Person For Libel Litigation 2

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No. 80-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUDOUN TIMES-MIRROR, et al.,
Petitioners,

v.

ARCTIC COMPANY, LTD., t/a
IROQUOIS RESEARCH INSTITUTE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit by Senior Circuit Judge Russell and Circuit Judge Sprouse has been reported as *Arctic Co. Ltd.* v. *Loudoun Times-Mirror,* 624 F2d 518 (1980).

The opinion of the District Court has not been officially reported. The decision was unofficially reported as *Arctic Company, Ltd., t/a Iroquois Research Institute* v. *Loudoun Times-Mirror, et al,* and *Arctic Company, Ltd., t/a Iroquois Research Institute* v. *R. E. McDaniel* in *Media L. Rep.* 1947 (1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 3, 1980. The Petition for Writ of Certiorari was filed October 1, 1980. This Brief in Opposition to Petition for Certiorari is filed after one enlargement of time duly granted by the Court, within 60 days of that date and by November 24, 1980. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

The facts pertinent to this Court's consideration are in Respondent's view, adequately set forth in the opinion below by Circuit Judge Sprouse for the Fourth Circuit Court of Appeals and will not be restated here. The opinion below has been reported as *Arctic Co. Ltd.* v. *Loudoun Times-Mirror,* 624 F.2d 518 (1980).[1]

REASONS FOR DENYING THE WRIT

The Court Below Correctly Found That Respondent Was Not A "Public Figure" Or A "Public Official" And That Respondent Was A Private Person For Libel Litigation.

In granting summary judgment for the Petitioners, Judge Bryan, Jr., the trial judge, found that Respondent was not a public figure (Pet. p. 13a). The court below agreed with the trial judge, and in so doing, it reinforced the District Court's finding by stating at p. 521:

> "We agree with the trial court that Iroquois is not a public figure in the libel context. It was not

---

[1] Page Reference herein to the opinion of the court of appeals will be made to the opinion as reported in the F2d series.

> generally known in the community—in fact the defendant news reporter only became aware of its identity during the preparation of the news story —and did not "press itself" into the public controversy over the use of Lowes Island. It merely performed a narrowly-defined professional service in a highly technical field. This background and activity does not fit the definition of a public figure. See *Wolston* v. *Reader's Digest Association,* 443 U.S. 157, 99 S. Ct. 2701, 61 L.Ed.2d 450 (1979); *Hutchinson* v. *Proxmire,* 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed. 2d 411 (1979); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967)."

In their response to the appeal below, Petitioners did not argue that the District Court had erred in failing to find that Respondent was a "public figure". Petitioners were content with the District Court's finding in this respect for they concentrated the entire thrust of their argument to the court below in support of the District Court's ultimate finding that Respondent was a "public official".

It comes as a surprise to Respondent that Petitioners, at this late date, should in effect abandon the District Court's finding, and ask this Court to consider this question without first notifying the court below of their views on the District Court's finding, that Respondent was not a "public figure". Petitioners apparently want it both ways. However, having previously accepted the District Court's decision without challenge, Petitioners should not now be permitted to challenge for the first time a decision in which they acquiesced. Petitioners cannot now argue a point which they failed to press below.

Significantly, the District Court found upon review of the evidence that "There is, in the Court's view, no evidence here that the plaintiff is a 'public figure' ". (Pet. p. 13a) The court below agreed with the trial court and went on to find that Iroquois "was not generally known in the community . . . and did not 'press itself' into the public controversy over the use of Lowes Island." (*Arctic supra* p. 521). The court below also found that Iroquois had "merely performed a narrowly-defined professional service in a highly technical field. This background and activity does not fit the definition of a public figure." (*Arctic supra* p. 521).

The mere fact that Iroquois received payment from public funds does not convert a private contractor into a "public official". Iroquois's report of its research could only be submitted to its contracting agency, the Fairfax County Water Authority, for its use and purpose. Such a report has no general circulation and cannot be equated with one who has "assumed a role of special prominence in the affairs of society," or one who "has thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved." *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 345 (1974). The general public's attention which was attracted to Lowes Island concerned its commercial development and not the water intake facility to be constructed by the Water Authority. Respondent, a private contractor, not concerned with the commercial development of the island, cannot be "automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston* v. *Reader's Digest Association,* 443 U.S. 157, 167 (1979). Until the publication by Petitioners of the newspaper accounts,

Respondent was not generally known in the community. Petitioners who have been charged with defamation cannot, by their own conduct create their own defense by making Respondent a public figure. *Hutchinson* v. *Proxmire,* 443 U.S. 111, 135 (1979).

To elevate Respondent, a private contractor, to the status of "public official," Petitioners disregard the limited purpose of Respondent's employment. Thus, the court below found that Respondent had been employed for only a short period of time, approximately six months, by the Fairfax County Water Authority. Respondent's role was "solely that of a scientific fact-finder, merely reporting to its principal, the Water Authority, the archeological facts as found. It had no control over the conduct of governmental affairs. It made no recommendations, participated in no policy determinations, and exercised no discretion. Its position was not of such apparent importance that the public has an independent interest in its qualifications beyond the general interests in the qualifications and performance of all governmental employees or consultants." (*Arctic supra* pp. 521-522). The court below correctly applied the criteria for determining whether a person is a "public official" for libel litigation as enunciated in *Rosenblatt* v. *Baer,* 383 U.S. 75, 85-86 (1966). Petitioners' discussion about the National Environmental Policy Act, 42 U.S.C. § 4321 does not detract in any way from Respondent's limited role in the matter, as found by the court below.

Petitioners argue that in light of the statutory scheme enacted by congress, the government must justify the environmental impact of its policy choices, and that scrutiny by the public at large is a part thereof, and further, that those who perform functions on be-

half of the government must expect scrutiny. (Pet. p. 17) However, performance of functions on behalf of the government does not equate to governmental functions, the performance of which by individuals raises those individuals to the level of "public official," as per *The New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) case.

Respondent performed a historical and archeological survey for the Fairfax County Water Authority. This does not constitute a governmental function which would elevate it to the status of "public official." *Rosenblatt* v. *Baer,* 383 U.S. 76, 86 (1966). The decision-making and judgment responsibilities were not delegated to Respondent but remained in the Water Authority, and this was so found by the court below.

The broad public participation and debate envisioned by Congress, and argued by Petitioners, as the basis for requiring free access by the press to these private contractors is fundamentally different from the full and vigorous consideration to be given to environmental values with regard to the decision-making process by a governmental agency. (Pet. p. 13) Congress did not intend debate upon how these values were assessed but only that they be fully assessed and that all factors be considered. (Pet. p. 12-13 n. 8).

If the Congressional intent was, in fact, as Petitioners would have this Court believe, it would have a far greater "chilling effect" on the implementation of the Congressional statutory scheme. Public scrutiny, as envisioned by Petitioners, would apparently give license to defame private contractors hired to perform the surveys as herein, and there is nothing advanced

by the Petitioners which discloses any such Congressional intent.

Although Petitioners argue that the effect of the opinion of the court below would be to insulate from the public and press scrutiny, an entire class of consultants (Pet. p. 10), this is contrary to the holding of the court below which was concerned with a very narrow set of facts pertaining to a single private contractor hired for a specific and limited project by a Water Authority. The opinion of the court below is limited to this situation and does not for one moment attempt to address itself to a "class" of contractors.

This Court Should Not Review The Case Because The Court Below Made A Nonfinal Judgment And Petitioners Have Not Shown The Existence Of Exceptional Reasons To Warrant Review Of The Case At This Stage Of The Proceedings.

The court below reversed the summary judgment of the district court and remanded the case for further proceedings. Thus, the status of the decision below is in the nature of a nonfinal judgment. This Court will not usually review a nonfinal judgment such as that herein, except for exceptional reasons. *American Construction Co.* v. *Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1892); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) Stern & Gressman, *Supreme Court Practice*, § 4.19 (5th ed. 1978). Petitioners have not set forth any exceptional reasons warranting review at this time.

It is submitted that the court below properly considered the matter and resolved it in accordance with established precedent of this Court.

CONCLUSION

For the foregoing reasons Respondent, Arctic Company, Ltd., t/a Iroquois Research Institute, respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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November 24, 1980

MOTION FILED
NOV 24 1980

No. 80-521

In The

Supreme Court of the United States

October Term, 1980

Loudoun Times-Mirror, et al.,
Petitioners,

v.

Arctic Co., Ltd., t/a
Iroquois Research Institute,
Respondent.

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Motion for Leave to File a Brief as Amici Curiae by The Reporters Committee for Freedom of the Press; The American Newspaper Publishers Association; The American Society of Newspaper Editors; The Associated Press Managing Editors; The National Association of Broadcasters; The National Newspaper Association; The Radio-Television News Directors Association; The Society of Professional Journalists, Sigma Delta Chi; and The Virginia Press Association; and Brief in Support of the Petition for a Writ of Certiorari.

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The Reporters Committee for Freedom of the Press, the American Newspaper Publishers Association, the American Society of Newspaper Editors, the Associated Press Managing Editors, the National Association of Broadcasters, the National Newspaper Association, the Radio-Television News Directors Association, The Society of Professional Journalists, Sigma Delta Chi, and the Virginia Press Association join together to move the Court

for leave to file a brief as *amici curiae* in support of the Petition for a Writ of Certiorari in this case. The consent of the petitioners, the Loudoun Times Mirror, Kyle Parks, and R.E. McDaniel, has been obtained. The consent of the respondent, Arctic Company, has been requested and denied. As organizations whose members are engaged in the gathering and dissemination of news reports concerning matters of public interest, movants believe that the ability of their members to serve the public has been greatly encumbered by the decision below.

Movants believe that their brief as *amici curiae* will aid this Court by (1) clarifying the far-reaching ramifications of the Court of Appeals decision for reporting the news, (2) describing how this decision, if permitted to stand, will inhibit criticism of governmental affairs, and (3) elucidating why the decision below is flatly inconsistent with well-established principles of constitutional law articulated by this Court and in conflict with numerous other lower court rulings.

Accordingly, movants respectfully request this Court to grant leave to file their accompanying Brief in Support of the Petition for a Writ of Certiorari.

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INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment and freedom of information interests of the press.

The American Newspaper Publishers Association is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of the "dignity and rights of the profession" (Society Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Associated Press Managing Editors is an organization of 600 editors of newspapers affiliated with the Associated Press, which is the largest newsgathering organization in the world. It is extremely interested in First Amendment problems and has been active in furthering the interests of a free press.

The National Association of Broadcasters is a trade association consisting of over 5,200 radio and television stations and all the nationwide commercial broadcast networks. Among its primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The National Newspaper Association is a trade association consisting of more than 5,500 weekly and daily newspapers located throughout the United States. A major purpose of the Association is to preserve the constitutional guarantee of freedom of the press for community newspapers.

The Radio-Television News Directors Association is a not-for-profit professional organization of journalists which includes approximately 1,700 members who are active in the supervision of gathering, reporting and editing of news and other information broadcast by the national networks and by local radio and television stations throughout the nation.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 35,000 members representing every branch and rank of print and broadcast journalism. The Society works to preserve the public's right to know, to require that the public's business be conducted in public and to keep governmental records open to public inspection.

The Virginia Press Association is a not-for-profit corporation registered in the Commonwealth of Virginia representing a majority of the daily and weekly newspapers published in Virginia. The purpose of the Association is to expedite programs and activities furthering the editorial excellence of these newspapers and their service to the citizens of Virginia. It maintains a commitment to defend the First Amendment and freedom of information.

If the decision of the Court of Appeals is not reversed, the membership of these *amici* will be adversely af-

fected in their ability to report on and criticize the performance of government.

SUMMARY OF ARGUMENT

The growth of American government over the past several decades has generated a new arm of public authority: contractors and consultants. Initially pervasive in aerospace and defense operations, the use of consultants and contractors has proliferated throughout federal, state and local government and shows no sign of abatement. Indeed, the distinctive symbiotic relationship created between government and these consultants and contractors satisfies the political and scientific exigencies of our times so well that they may soon surpass the full-time employee as the chief *de facto* policymaker in government.

It is in this context that the decision of the Court of Appeals below should be reviewed. The decision denies the press and public requisite First Amendment protection when reporting on the conduct of public affairs by government consultants and contractors. In refusing to classify these firms and individuals as "public officials" or "public figures" when they bring defamation actions, the Court of Appeals has excluded an entire arm of government from the constitutional requirements of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

The *New York Times* privilege encompasses criticism of *all* those responsible for performing the functions of government, not simply elected officials or full-time employees. *See Rosenblatt v. Baer,* 383 U.S. 75, 85 (1966); *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967). Government contractors and consultants fall squarely within this category when they are engaged in the formulation or implementation of governmental policy. It is the nature of their participation in public affairs – *i.e.,* their

significant role in the governmental process — that renders them subject to the "actual malice" standard.

The decision of the Court of Appeals, holding that a government consultant need not prove "actual malice," stands in direct conflict with *New York Times* and its progeny. Unless reversed by this Court, it threatens to stifle public and press criticism of this class of actors increasingly responsible for the conduct of governmental affairs.

ARGUMENT

THE COURT OF APPEALS DECISION UNCONSTITUTIONALLY DENIES THE PRESS AND PUBLIC THE REQUISITE FIRST AMENDMENT PROTECTION WHEN REPORTING ON THE CONDUCT OF PUBLIC AFFAIRS BY GOVERNMENT CONTRACTORS AND CONSULTANTS.

This case squarely presents perhaps the most significant unresolved issue in the constitutional law of defamation: whether the press and the public can rely upon the safeguards enunciated in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), when reporting on the host of contractors and consultants increasingly responsible for the conduct of governmental affairs. In refusing to classify these firms and individuals as "public officials" or "public figures" when they bring defamation actions, the Court of Appeals has disavowed the "central meaning of the First Amendment," as expounded by this Court in *New York Times,* 376 U.S. at 273, and has denied the press the "breathing space" so essential to robust scrutiny of the

conduct of governmental affairs in a democracy, *id* at 271-72.[1]

The role played by the Iroquois Research Institute ("Iroquois") in this case epitomizes a well-documented trend in modern America – the growing delegation of a plethora of governmental functions to consultants and contractors. In fiscal year 1979, the federal government alone awarded 13,848 such contracts,[2] at a cost of between $9.3 and $13.4 billion.[3] Some $30 million in federal revenues are paid to

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[1]Unlike recent defamation cases accepted for review in this Court, *see, e.g.*, Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) (subject of contempt citation); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (research scientist); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (party in divorce litigation); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (private attorney), this case involves a defamation plaintiff who complains about press criticism of his performance of a governmental function. Indeed, this case illustrates an unfortunate byproduct of this Court's recent attempts to stem unwarranted expansion of the application of the "actual malice" standard. The Court of Appeals, by mechanical reference to tests devised for those whose conduct has scant relevance to governmental affairs, has seriously inhibited the criticism of government that lies at the heart of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In contrast, other courts have applied the "actual malice" standard to plaintiffs who can not, by any stretch of the imagination, be said to have played a role in the governing process, even though they clearly satisfy the definition of a "public figure" set forth in *Gertz, Firestone, Wolston,* and *Hutchinson. See, e.g.*, Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980) (former girlfriend of Elvis Presley). *Amici* urge the Court to take advantage of this opportunity to re-affirm, for the benefit of lower courts, the continued vitality of the *New York Times* doctrine in cases, such as this, in which the press has been inexplicably denied protection derived from the theoretical underpinnings of the doctrine.

[2]*See* Wash. Post, June 22, 1980, at A1, col. 1 (copies on file with the Clerk of the Court).

[3]*Compare id.* ($9.3 billion) *with id.*, June 25, 1980, at A10, col. 2 (Office of Management and Budget asserts $13.4 billion spent on contracts in fiscal 1979).

contractors and consultants each day, more than $1 million every hour.[4] President Carter has estimated that the United States is currently a party to approximately 30,000 such contracts, involving 10,777 individual appointments.[5]

The federal government has delegated the activities of all three branches to these contractors and consultants,[6] with the greatest impact felt in the executive branch. The Comptroller General has concluded that administrative agencies frequently rely on consultants "for making policy, management, and program decisions."[7] Often, a contract is awarded precisely because the government itself lacks the expertise to formulate policy or implement it effectively.[8] As a result, there is considerable evidence that government rarely scrutinizes and routinely accepts the recommendations of its contract employees.[9]

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[4]*Id.*, June 22, 1980, at A16, col. 1; *id.*, June 24, 1980, at A1, col. 2.

[5]*Comptroller General, Controls Over Consulting Service Contracts of Federal Agencies Need Tightening* 38 (Mar. 20, 1980) (reprinting, Memorandum for the Heads of Executive Departments and Agencies (May 12, 1977)).

[6]Contractors and consultants play an instrumental role in the legislative process, often preparing the official Congressional testimony of governmental officials concerning proposed legislation. *Id.* at 13. Although it is not precisely relevant to the issues raised by the instant case, it may also be observed that the judicial branch, through the increasing use of special masters and arbitrators, has arguably delegated a portion of the judicial function as well. *See generally,* Note, *"Mastering" Intervention in Prisons,* 88 Yale L.J. 1062 (1979) (special masters); Rehnquist, *A Jurist's View of Arbitration,* 32 Arb. J. (n.s.) 1 (1977) (arbitration).

[7]*Comptroller General, supra* note 5, at 30.

[8]*Id.* at 27.

[9]Wash. Post, June 22, 1980, at A14, col. 6.

This phenomenon has also been felt at the local level. A recent study found that 91% of the 2,625 cities surveyed had engaged a consultant at least once in the preceeding two years.[10] Some cities entered into as many as 400 consulting contracts during this period.[11] These consultants were most often employed to undertake "planning and development" decisions on behalf of city government, usually because the "official" government lacked "sufficient in-house staff, the . . . skills to complete a particular project" or desired "an independent opinion."[12]

The extent to which governmental functions are delegated to contractors and consultants can hardly be overestimated. Nearly 90% of the budget of the Department of Energy ("DOE"), some $11 billion, is paid to consultants and contractors.[13] Indeed, DOE has entered into approximately 4,000 such contracts, involving 200,000 workers or nearly ten times the Agency's internal staff of 21,000.[14] In recent joint Congressional hearings, Senator David Pryor aptly described the result of the government-contract phenomenon as "a basic change in the way government does its work. It is hard to understand," he concluded, "what, if anything, is left for federal employees to do."[15]

The transfer of governmental functions to contractors and consultants has been properly followed by increasing

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[10] *International City Management Association, Municipal Consultants: Patterns and Practices* 1 (Dec. 1979).

[11] *Id.* at 3.

[12] *Id.* at 2-3.

[13] Wash. Post, June 25, 1980, at A1, col. 1.

[14] *Id.*

[15] *Id.*

press coverage. This scrutiny has exposed conflicts of interest, waste, favoritism, and substandard performance, as well as evidence that government frequently uses contractors and consultants effectively.[16] Yet, the decision of the Court of Appeals threatens to inhibit the press from reporting on and criticizing the performance of this newest arm of government. *See New York Times Co., supra,* 376 U.S. at 282.

In its decision below, the Court of Appeals holds that Iroquois is neither a public official nor a public figure, thereby relieving it of the burden of proving "actual malice."[17] The Court's opinion, written by Judge James M. Sprouse, wholly ignores the explicit factual findings of the district court, Albert V. Bryan, J., detailing Iroquois's central role in the governmental process.[18] Judge Bryan found that Iroquois, an archaeological consulting firm, had been hired by the Fairfax County (Virginia) Water Authority ("FCWA") to review the environmental impact of its plan to build a water-intake facility on Lowes Island in Loudoun County, Virginia.[19] Federal law charged FCWA with the task of conducting this review, but permitted the government agency to delegate its performance to a consultant such as Iroquois.[20] According to Judge Bryan, the FCWA project and the island had "become the

[16] *See, e.g.,* Minn. Tribune, Aug. 17, 1980, at 1A; Wash. Post, June 22, 1980, at A1, col. 1; Wash. Post, June 23, 1980, at A1, col. 1; Wash. Post, June 24, 1980, at A1, col. 1; Wash. Post, June 25, 1980, at A1, col. 1.

[17] Arctic Co. v. Loudoun Times Mirror, No. 79-1121 (4th Cir. July 3, 1980) (reprinted in Petitioner's Appendix at 1a).

[18] Arctic Co. v. Loudoun Times Mirror, Nos. 78-786-A & 78-817-A (E.D. Va. Dec. 18, 1978) (reprinted in Petitioner's Appendix at 9a).

[19] *Id.* at 11a.

[20] *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976); National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1976).

focal point of public concern because of the archaeological treasures believed to be beneath its surface."[21] Iroquois, the judge found, injected itself into this controversy by concluding, in its final report, that the FCWA project site was the best of all alternative locations,[22] and that archaeological treasures located on the site could be safely removed.[23] Thus, there was, according to Iroquois, no need to preserve the site by denying a construction permit to its employer, FCWA, contrary to the view of many opponents of the project. Iroquois's findings and conclusions were in turn presented to the United States Army Corps of Engineers, which thereafter granted the requested permit to FCWA.[24]

The newspaper article at issue in this litigation constitutes a report about this public controversy, as well as Iroquois's role in it. Specifically, the article quotes another archaeologist, petitioner McDaniel, who was critical of Iroquois's study methods and conclusions.[25] These criticisms of Iroquois's performance on behalf of FCWA form the basis of Respondent's claim and constitute a textbook example of the kind of expression that *New York Times* seeks to protect.

In *New York Times*, this Court created the "actual malice" standard so that press and public alike would be "uninhibited" in criticizing those responsible for formulating and implementing governmental policy. 376 U.S.

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[21] Arctic Co. v. Loudoun Times Mirror, Nos. 78-786-A & 78-817-A, at 11a (E.D. Va. Dec. 18, 1978) (page citation to Petitioner's Appendix).

[22] *Id.* at 12a; *see* Petitioner's Appendix at 47a.

[23] *See* Petitioner's Appendix at 47a.

[24] Arctic Co. v. Loudoun Times Mirror, Nos. 78-786-A & 78-817-A, at 12a (E.D. Va. Dec. 18, 1978) (page citation to Petitioner's Appendix).

[25] *Id.*

at 270. The Court recognized that a citizen's ability to criticize the performance of governmental functions "is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). To permit the subjects of this criticism to punish the "citizen-critic of government," *New York Times Co., supra*, 376 U.S. at 282, would be tantamount to a prosecution for seditious libel, *id.* at 276.

The First Amendment privilege in libel law encompasses criticism of *all* those responsible for performing the functions of government, not simply elected officials or full-time public employees.[26] In *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), this Court emphasized that "[c]riticism of those responsible for government operations must be free, lest criticism of government be penalized." Accordingly, the "actual malice" standard must apply

> at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. *Id.* [emphasis added].

Indeed, in a concurring opinion, Mr. Justice Douglas recognized that the "actual malice" rule must extend as well to "those who contract to carry out governmental missions" since they "are as much in the public domain as any so-called officeholder." *Id.* at 89 (Douglas, J., concurring).

The full court endorsed Justice Douglas's view in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In the con-

[26]The "actual malice" rule has consistently been applied to candidates for public office, even though they hold no governmental post. *See, e.g.*, James M. Sprouse v. Clay Communications, Inc., 211 S.E.2d 674 (W.Va. 1975) (court recognizes "chilling effect" of $750,000 jury award to gubernatorial candidate).

trolling opinion in that case, Mr. Chief Justice Warren explained that "[i]ncreasingly in this country, the distinctions between governmental and private sectors are blurred," due, in large part, to the "surging growth of science and technology." *Id.* at 163. Thus,

> [i]n many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions. *Id.* at 163-64 (Warren, C.J., concurring).

Government contractors and consultants fall squarely within this category when they are engaged in the formulation or implementation of governmental policy. It is the nature of their participation in public affairs — *i.e.*, their significant role in the governmental process — that renders them subject to the "actual malice" standard. Whether they are classified as "public officials" or "public figures" is of little consequence, so long as the "critic of official conduct" is free to contribute to an "uninhibited, robust, and wide-open" debate on the performance of his government. *New York Times Co., supra,* 376 U.S. at 270.[27]

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[27]None of this Court's recent defamation cases involved claims by plaintiffs who performed governmental functions. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (private attorney); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (party in divorce litigation); Wolston

Prior to the Court of Appeals decision below, both this and lower courts had faithfully and consistently applied the *New York Times* standard to contractors and consultants who, like Iroquois, have voluntarily entered into a symbiotic partnership with government. The standard has been applied to so-called "independent" contractors engaged in the performance of public duties, including, *inter alia,* sanitation collection,[28] traffic control,[29] and

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v. Reader's Digest Ass'n., Inc., 443 U.S. 157 (1979) (subject of contempt citation); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (scientist engaged in "pure" research under government grant). In all these cases, this Court made clear that the "actual malice" standard applies not only to those who formulate and implement public policy, but also to those who voluntarily "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); *see* Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler, 398 U.S. 6, 9 (1970) (plaintiff who sought controversial construction permit "fell within even the most restrictive definition of a 'public figure' "). Since the plaintiffs in *Gertz, Firestone, Wolston,* and *Hutchinson* neither performed governmental functions nor voluntarily injected themselves into public controversies, this Court held they were not subject to the "actual malice" rule.

Although *Hutchinson* dealt with a plaintiff who had obtained federal funding for his research concerning aggression in monkeys, the Court did not address the issue presented here. The Court in *Hutchinson* expressly declined to consider whether Mr. Hutchinson was a "public official," *see* 443 U.S. at 119 n.8, and he was clearly not engaged, like Iroquois, in the formulation or implementation of public policy having any practical or political impact on the general public.

[28]*See* Arizona Biochemical Co. v. Hearst Corp., 302 F. Supp. 412 (S.D.N.Y. 1969).

[29]*See* Clawson v. Longview Publishing, 4 *Media L. Rep. (BNA)* 2163 (Wash. Jan. 5, 1979).

motor vehicle registration. [30] Other courts have consistently required the standard to be met by contractors involved in the formulation of governmental policy in such fields as space exploration,[31] national defense,[32] and property taxation rates.[33] As Judge Bryan made clear, none of these contractors or consultants had more influence over governmental decisionmaking than Iroquois's central role in formulating environmental policy for Loudoun County.

The decision of the Court of Appeals, therefore, stands in direct conflict with the lion's share of decisions rendered under *New York Times*. Worse, it suggests an avenue by which elected officials may avoid public scrutiny or chill criticism simply by delegating their public responsibilities to contractors and consultants. Ironically, such a built-in incentive would only contribute to the proliferation of these already ubiquitous public servants. Unless reversed by this Court, the Court of Appeals decision threatens to stifle public and press criticism of this class of actors increasingly responsible for the conduct of governmental affairs. By depriving the citizenry of these press reports about the operation of its government, the Court of Appeals decision has subverted the "central meaning" of the First Amendment.

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[30]Hodges v. Oklahoma Journal, 6 *Media L. Rep. (BNA)* 1750 (Okla. June 24, 1980); *see also* Alexander v. Lancaster, 330 F. Supp. 341 (W.D. La. 1971); Bishop v. Wometco Enterprises, Inc., 235 So. 2d 759 (Fla. App.), *cert. denied*, 240 So. 2d 813 (Fla. 1970); *but cf.* Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976) (civil engineer employed part-time by municipality not public figure).

[31]Adey v. United Action for Animals, Inc., 361 F.Supp 457 (S.D.N.Y. 1973) (Weinfeld, J.), *aff'd mem.*, 493 F.2d 1397 (2d Cir. 1974).

[32]Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F.Supp. 947 (D.D.C. 1976), *aff'd mem.*, D.C. Cir., Mar. 31, 1978.

[33]Gleichenhaus v. Carlyle, 5 *Media L. Rep (BNA)* 1602 (Kan. July 14, 1979).

CONCLUSION

For the reasons herein stated, your *amici* respectfully request the Court to grant certiorari in this action.

Respectfully submitted,

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APPENDIX

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Re: Loudoun Times-Mirror, et al. v. Arctic Company, Ltd., t/a Iroquois Research Institute, No. 80-521

Dear Mr. Sanford:

As counsel to the petitioners in this case we consent to your filing an amicus brief in this proceeding on behalf of a number of national press organizations. We understand that you will file this brief no later than November 24, 1980, in compliance with the extension of time granted to the respondent.

Very truly yours,

/s/ Michael S. Horwatt
Michael S. Horwatt

MSH:dl